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Supreme Court of the United States

OCTOBER TERM 1955.

No. 307 MISC.

HIRAM B. WALLER, Sheriff of the Parish of Franklin, State of Louisiana,

Petitioner,

versus

UNITED STATES OF AMERICA, ex rel JOSEPH SHEFFIELD,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI: (under 28 U.S.C. 1651(a).)

Fred S. LeBlanc, Attorney General of the State of Louisiana; M. E. Culligan, Assistant Attorney General, Hugh M. Wilkinson, Special Assistant Attorney General; and Harry N. Anders, District Attorney of the Fifth Judicial District of Louisiana, as counsel for the petitioner above-named, respectfully move this Honorable Court for leave to file the petition for writ of certiorari, hereunto annexed, under 28 U.S.C. 1651, directed to the United States Court of Appeals for the Fifth Circuit, to review an order of that Court entered on May 31st, 1955, on which a rehearing was denied on July 18th, 1955, and which order is more particularly described in the petition, and for such other and further relief as may be just and proper.

October ...., 1955.

FRED S. LeBLANC,
Attorney General of Louisiana.
M. E. CULLIGAN,
Assistant Attorney General.
HUGH M. WILKINSON,
Special Assistant Attorney General.
HARRY N. ANDERS,
District Attorney, Fifth Judicial District of Louisiana.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1955.

No.

HIRAM B. WALLER, Sheriff of the Parish of Franklin, State of Louisiana,

Petitioner,

versus

UNITED STATES OF AMERICA, ex rel JOSEPH SHEFFIELD,

Respondent.

PETITION FOR WRIT OF CERTIORARI (under 28 U.S.C. 1651) TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Fred S. LeBlanc, Attorney General of the State of Louisiana; M. E. Culligan, Assistant Attorney General, Hugh M. Wilkinson, Special Assistant Attorney General; and Harry N. Anders, District Attorney of the Fifth Judicial District of Louisiana, as counsel for the petitioner above-named, respectfully move this Honorable Court for leave to file the petition for writ of certiorari, hereunto annexed, under 28 U.S.C. 1651, directed to the United States Court of Appeals for the Fifth Circuit, to review an order of that Court entered on May 31st, 1955, on which a rehearing was denied on July 18th, 1955, and which order is more particularly described in the petition, and for such other and further relief as may be just and proper.

October ...., 1955.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit

to review a judgment of that Court entered May 31st, 1955, rehearing on which was refused July 18th, 1955. Effect of the judgment complained of was to deny to the petitioner officer of the State of Louisiana a meritorious appeal from a decree in the United States District for the Western District of Louisiana granting a writ of habeas corpus to a relator held under state process after conviction of the crime of murder. A certified transcript of the record in the mentioned case is furnished herewith in accordance with Rule 31(2) of this Honorable Court, and all subsequent proceedings in the United States Court of Appeals for the Fifth Circuit, certified as correct, are filed as an appendix to this petition.

(a) OPINIONS BELOW.

The opinion of the District Court complained of was entered December 23rd, 1954, and is found beginning at page 672, Volume 3, of the transcript (judgment follows at page 690), and is reported in 126 Federal Supplement 537.

The opinion of the Circuit Court complained of (rendered by per curiam) was entered on May 31st, 1955, and is found at page 104 of the appendix to this petition (petition for rehearing denied July 18th, 1955), and is reported in 224 Federal Reporter (2d) 280 (advance sheets of September 12th, 1955).

(b) JURISDICTIONAL STATEMENT.

(i) The judgment sought to be reviewed was dated and entered on May 31st, 1955 (appendix, page 105).

(ii) Petition for rehearing (appendix, page 106) was filed June 21st, 1955, and was denied without opinion (appendix, page 111) on July 18th, 1955. Certiorari is applied for within 90 days.

(iii) Jurisdiction is conferred on this Honorable Court to review by 28 U.S.C. 1651 (a) (as amended 1948). See *House v. Mayo*, 324 U.S. 42, 65 S.Ct. 517 (decided in 1945). Cited case is in all respects comparable except that it involved refusal of habeas corpus to a state prisoner, whereas in the case at bar habeas corpus has been granted, and the official who has custody of the State's prisoner complains.

(c) QUESTIONS PRESENTED FOR REVIEW.

1.—The District Court's judgment (transcript, page 690) was entered January 10th, 1955. Notice of appeal (page 692) was entered February 7th, 1955, and on the same day appellant obtained an extension of time (page 693) to complete transcript and apply for a certificate of probable cause for appeal under 28 U.S.C. 2253. Such application was duly made within the permitted and legal delay on April 19th, 1955 (Transcript, volume 4, pages 1 to 11, and supporting brief at pages 11 to 69). Despite meritorious grounds shown in this application and brief for allowance of the appeal supported by a certificate of

probable cause for appeal, the district judge denied the certificate of probable cause.

2.—Having the right under 28 U.S.C. 2253 to seek a certificate of probable cause from a circuit judge, appellant lodged his appeal in the United States Court of Appeals for the Fifth Circuit on May 6th, 1955, under the docket No. 15,575, and simultaneously filed an application to that court, and the judges thereof, for such a certificate (appendix, page 27), in order that the appeal might proceed, and the correctness or incorrectness of the district judge's ruling, so seriously affecting the State of Louisiana's administration of the police power over crimes of violence within its borders, might be reviewed by higher authority.

3.—In the foregoing applications, in both courts, for a certificate of probable cause to support the appeal, appellant specifically pointed out numerous conflicts between the opinion handed down by the federal district judge and the holdings of the Supreme Court of Louisiana on matters of State criminal procedure, and urged that these conflicts not only made a review necessary in the instant case itself, but also it was necessary to clarify the confused procedural situation resulting from the differences between state and federal interpretations of the same questions.

4.—That on May 31st, 1955, Hutcheson, Chief Judge, and Rives and Tuttle, Circuit Judges, entered a per curiam (appendix, page 104) merely saying that none of the judges of the court being of the opinion that a certificate

of probable cause should issue, the application was denied. No order was at that time entered dismissing the appeal.

5.—Within the delay of 21 days fixed by the rules, appellant petitioned for a rehearing on the question of the granting of a certificate of probable cause, on June 21st, 1955, (appendix, page 106).

6.—On July 18th, 1955, the clerk issued a written notice to counsel for appellant that the Court on that day had entered an order denying the petition for rehearing, and no opinion had been rendered in connection therewith.

7.—In five recent analogous cases (*Harris v. Ellis*, 194 F2d 604; *Seymour v. Ellis*, 196 F2d 495; *Davis v. Ellis*, 199 F2d 754; *Harris v. Ellis*, 204 F2d 686; and *Oliver v. Ellis*, 210 F2d 824) the Fifth Circuit, in denying certificates of probable cause to prisoners held under state process, had expressly dismissed their appeals; there being no express dismissal thus far of the instant case, counsel addressed the letter of July 19th, 1955, to the clerk, which counsel is informed was docketed as a motion (appendix, page 111) seeking a clarification of the status of the instant case. Counsel, hearing nothing from this letter, and within 10 days from refusal of rehearing, filed, on July 28th, 1955, a motion for a stay of mandate (which might issue, under the rules, the following day), asking that the mandate be stayed long enough to permit of application for certiorari to review the entire proceeding. Counsel was next advised by the clerk that on August 1st, 1955, the motion for a stay on mandate was denied without comment, whereupon the mandate was issued the

same day to the district court. The mandate, dated August 1st, 1955, for the first time, included in its text a statement that this appeal "be, and the same is hereby dismissed, for want of jurisdiction."

8.—The basic question, therefore, presented for review is the error of the circuit court in effecting the dismissal, without hearing, of what is claimed to be a very meritorious appeal, by declining to grant a certificate of probable cause for the appeal under 28 U.S.C. 2253. In *House v. Mayo*, 324 U.S. 42, 65 S.Ct. 517, where there was a comparable situation coming up from the same circuit, your Honors held it was error for the circuit court not to have issued the certificate (page 521) and reversed. Other questions, which arose in the district court, involve conflicts of law between the district court's ruling, on the same hand, and state statutes and decisions of the Supreme Court of Louisiana, on the other. These questions, going to the merits of the case and the merit of the state officer's appeal, will be discussed, in order, in the concise statement of the case hereafter in this petition.

(d) STATUTES INVOLVED.

28 U.S.C. 2253 declares that "in a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit where the proceeding is had," but that "an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court, unless the justice or judge who rendered

the order or a circuit justice or judge issued a certificate of probable cause." In practical effect, the right of the State of Louisiana, through its constituted authorities, to prosecute and punish relator, according to the laws of that State, for the homicide he had committed within its jurisdiction, has been interfered with by the ruling on habeas corpus of the federal district judge. While the local sheriff is the nominal party to the suit, the state is the real party at interest, and accordingly the Attorney General of the State of Louisiana, with his assistants, regular and special, made himself and themselves of counsel in the case, and presented for review the inconsistencies between the federal judge's interpretations of state law on criminal procedure, on the one hand, and the state statutes themselves and the holdings of the State Supreme Court thereon, on the other hand. The consequence of the refusal, both in the district court and the circuit court, of a certificate of probable cause, as provided for in the above-quoted text of 28 U.S.C. 2253, was to deprive the state's officer and, through him, the state itself, represented by its Attorney General, of its day in court to endeavor to convince the circuit judges of the errors in the district judge's ruling. The controversy squarely presents an instance where a court of appeals, in ultimate result, "has decided an important state or territorial question in a way in conflict with applicable state or territorial law," by denying review of such errors below, and sound judicial discretion should commend the granting of the writ of certiorari now applied for under the reason (as quoted) indicated by Rule 19(1-b) of this Honorable Court.

Other statutes, particularly of Louisiana, involved in the case, are cited in the discussion hereafter of the errors of

the district court which should be reviewed, under paragraph (h) presenting the argument amplifying the reasons relied on for the writ.

(e) CONCISE STATEMENT OF CASE.

On the afternoon of Sunday, June 14th, 1953, at the home of Mrs. John H. Wilson, on a farm about three miles south of the town of Wisner, in Franklin Parish (county), in the State of Louisiana, the relator, Joseph Sheffield, inflicted a beating on his younger brother. Mrs. Wilson is Sheffield's mother, who had re-married. At the time Sheffield was a resident of Arkansas and had come to his mother's home on a visit. He was a white man and 24 years of age at the time of the event now related. After the beating administered to his brother, the latter left the scene and telephoned a complaint to the Sheriff's office at the parish seat, Winsboro, as a result of which Deputy Sheriff John L. Waller, who was on patrol duty in an automobile, was sent a radio order to proceed to the place and investigate a complaint of a disturbance. At the town of Wisner, Deputy Sheriff Waller picked up Homer Hodge, a state conservation agent, who rode with him to Mrs. Wilson's home. Pending arrival of the deputy sheriff, Sheffield was seen by persons in the house to load a shotgun and was heard to say that if anyone came out there someone would die. When the automobile occupied by the officers arrived, Sheffield stepped out of the back door and walked to the right side of the vehicle, carrying the shotgun in a threatening manner, and, when Deputy Sheriff Waller, who had been in the driver's seat on the left hand side, was in the act

of getting out of the car, Sheffield fired the shotgun at close range through the vehicle. Conservation Agent Hodge, seated on the right side, ducked forward just in time; the blast seared the back of his neck and the shot struck Waller, who fell to the ground at the side of the car, killed instantly. The position of the State is that there was not the slightest excuse or justification for the killing, that it was deliberately and wantonly done and was an act born of an anti-social disposition and animosity to law officers resulting from previous troubles Sheffield had experienced because of other lawless acts on his part.

Sheffield was arrested the same afternoon and placed in the parish jail at Winsboro. The killing of the deputy, a brother of the parish sheriff, caused excitement, but there were no manifestations against the prisoner. He made a voluntary statement to the District Attorney that evening, which was reduced to writing and signed by him the next morning. Also the next morning (June 15th) he made a further voluntary statement to the District Attorney, which was also reduced to writing and signed by him. The two statements, read together, clearly admitted a state of facts conceding an unprovoked killing of the deputy and indicative of premediated murder. Sheffield also asked District Attorney Anders for a speedy judicial disposition of the matter (testimony of Anders, transcript, page 338).

Term of court was to end on June 30th, and because of a circuit arrangement of terms, court would not sit again in Franklin Parish until November. There were eye-wit-

nesses to the shooting, residing in Arkansas, and only temporarily within reach of the process of the Louisiana court, also to be considered. Accordingly a session of the grand jury was held on Wednesday, June 17th, and on that day Sheffield was indicted and arraigned, counsel were appointed to represent him, and he and they were notified he would be tried on Monday, June 29th. In selecting counsel to defend Sheffield, the judge picked all available members of the parish bar, including a former district attorney.

Defendant's counsel were of the opinion they had ample time in the twelve intervening days to investigate and prepare relator's case, and that they had no legal grounds to advance in a written motion, as required by Louisiana law, for a continuance.

Accordingly, the case went to trial on Monday, June 29th, 1953, a jury was regularly empaneled, all witnesses to the homicide were heard, arguments were had, the jury was charged, and it retired on Tuesday, June 30th, and found a verdict of guilty as charged. Sheffield was sentenced to death on Friday, July 3rd. No appeal was taken because the trial had developed no appealable issue of law.

Over five months thereafter, on December 19th, 1953, relator, through other counsel then employed by his family, endeavored to file a motion for a new trial, which the trial judge declined to accept because he was powerless under state law to consider a motion for new trial filed after the imposition of sentence. Counsel then ap-

plied, on January 29th, 1954, to the Supreme Court of Louisiana for writs of certiorari, mandamus and prohibition. These were refused, the Supreme Court of Louisiana holding, in a per curiam opinion, that the action of the trial judge on the motion for a new trial had been correct (No. 41,689, February 15th, 1954, not published). Counsel for Sheffield then petitioned to this Honorable Court for certiorari to review the decision of the Louisiana Supreme Court, but the writ was denied on October 14th, 1954, without prejudice to relator's right to apply to the appropriate United States District Court for habeas corpus (75 S.Ct. 67, advance sheets of November 15th, 1954). This action for habeas corpus in the Western District of Louisiana then followed.

(f) REVIEW OF STATE COURT JUDGMENT.

No state court judgment is sought to be reviewed.

(g) REVIEW OF FEDERAL COURT JUDGMENT.

The federal judgment sought to be reviewed was based in the district court on 28 U.S.C. 2241, vesting jurisdiction in the district courts to grant writs of habeas corpus. It is largely based in the circuit court on 28 U.S.C. 2253, requiring a certificate of probable cause to support an appeal from a habeas corpus judgment "where the detention complained of arises out of process issued by a state court."

(h) ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT.

This Honorable Court has indicated by Rule 19(1-b) that among the special and important reasons for granting a review on certiorari is where a federal court has decided an important state question in a way in conflict with applicable state law. The decision herein of the federal district court, which unjustifiably interferes with the process of a court of the State of Louisiana, contains a number of errors which are in conflict with state law, and which should be corrected as a matter of comity, and should not be allowed to stand as precedents to hang the threat of further interference over every similar criminal prosecution in Louisiana. Succinctly stated, the federal district judge, in his opinion, has lumped together a number of unfounded grievances concerning Sheffield's trial in order to cumulate his reasoning into a general finding of deprivation of constitutional due process; but, in so doing, he has defied in various instances the terms of Louisiana procedural statutes and the applicable interpretations thereof by the Supreme Court of Louisiana. Sheffield actually had all the due process guaranteed him. If his trial was short and unvarnished, it was because the facts of his case allowed for nothing more and his reputable attorneys were not called on to try to manufacture defenses which did not exist. If no appeal was taken it was because no errors of law were present on which to base an appeal. Opposing counsel has failed to show any material particular in which the trial procedure could be changed, even if held again.

For categorical statement of the instances of error attributable to the federal district judge in rulings on or interpretations of Louisiana criminal procedure, and which presented meritorious causes for review, and which review has been denied by the circuit court, petitioner respectfully refers your Honors to the following summary of the principal issues of the habeas corpus case. All statutes of Louisiana and authorities of the Louisiana Supreme Court claimed to be inconsistent with the ruling below are cited in detail, and make apparent the fallacy of the ruling below that such a cumulation of grievances *having no legal basis* can be added up to make a showing of alleged lack of due process under the federal constitution.

SUMMARY OF ISSUES IN HABEAS CORPUS CASE.

(a) Federal District Judge's assertion of "haste" in fixing and trying Sheffield case.

The case was fixed for trial strictly in accordance with the requirements of Articles 17, 314, 315 and 320 of Louisiana's Code of Criminal Procedure. *State v. Crawford*, 41 La. Ann. 589, 6 So. 471; *State v. Frith*, 194 La. 508, 194 So. 1; *State v. Blue*, 134 La. 561, 64 So. 411. There was nothing unusual or especially complicated about preparation of the case for trial; all of the eyewitnesses to the killing were present and had given statements, which were reduced to writing and furnished to defense counsel; the prisoner was in good health and able to confer with his lawyers and assist them in pre-

paring his defense; and the facts of the homicide were practically undisputed and no legal issues were apparent. Under such circumstances, fixing the case for trial twelve days after arraignment was well within the allowable period for preparation for trial of a murder case as established by decisions of the Louisiana Supreme Court. *State v. Wilson,* 181 La. 61, 158 So. 621; *State v. Roberson,* 157 La. 974, 103 So. 283; *State v. Johnson,* 36 La. Ann. 852; and *State v. Chitman,* 117 La. 905, 42 So. 437 (where seven days to prepare murder trials was approved); and *State v. Satcher,* 124 La. 1015, 50 So. 835 (where eight days was approved). The Louisiana jurisprudence on the subject clearly sustains the fixing of the *Sheffield* case twelve days after arraignment. This point is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 23 to 32.

(b) Federal District Judge's criticism of "failure to seek continuance."

Legal right to a continuance and the requisites to obtain a continuance are governed by Articles 318 to 325 of Louisiana's Code of Criminal Procedure. The habeas corpus proceeding is barren of any showing of facts or circumstances which would have enabled defense counsel to comply with these requirements by demonstrable evidence, rather than by the matters of speculation and conjecture advanced in the opinion regarding possible causes for delay. In these matters the defense counsel had nothing to proceed on in accordance with Louisiana law, but the judgment on habeas corpus seeks to hold them to a professional accomplishment in spite of the limita-

tions put upon them by Louisiana law. This point is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 32 to 37.

(c) Federal District Judge's criticism of "failure to seek change of venue."

Right to change of venue in Louisiana and the requisites necessary to obtain such a change of venue are governed by Articles 290 to 293 of Louisiana's Code of Criminal Procedure. Inability of the accused to obtain an impartial trial in the parish where the indictment is pending must be urged, under oath, and proved by legal and sufficient evidence. There was no evidence available of the existence of such a state of affairs in Franklin Parish. On the contrary, Sheffield did receive an impartial trial, and no fact of trial impartiality is shown in the proceeding on habeas corpus, even after the trial had taken place. The fact that an accused actually received a fair trial at the hands of his jurors cures any previous error which might have existed in a refusal of change of venue. *Stachlin v. Destrehan,* 2 La. Ann. 1019; *State v. Abshire,* 47 La. Ann. 542, 17 So. 141; *State v. Blount,* 124 La. 202, 50 So. 12; *State v. Roberson,* 159 La. 562, 105 So. 621. Fair publication of the facts of the crime and temperate comment on them was within the right of the local newspaper, and no proof was adduced on the habeas corpus trial of such public excitement as frustrated usual methods of obtaining an impartial jury or prevented calm judgment by the jurors. *Shushan v. United States,* 117 Fed. 2d. pages 115 and 116. This point is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 37 to 47.

(d) Federal District Judge's criticism of discharge of ministerial duties during trial by sheriff, who was victim's brother.

The opinion on habeas corpus proceeds on the hypothesis that Sheriff Waller was "required by the Louisiana constitution" to recuse himself from ministerial duties during the trial because his brother had been the victim of the homicide. This is, unintentionally, we are sure, a misstatement of the text of the Louisiana constitution. Sections 65 and 71, Article VII, Louisiana Constitution. Title V, Code of Criminal Procedure. Title 13, section 3334, Revised Statutes of Louisiana of 1950, re-enacting section 4 of Act 223 of 1928. The contrary, rather, is true, that Sheriff Waller would not have had the right to refrain from performing huis customary ministerial duties during a criminal trial in his parish. Be that as it may, the record on habeas corpus is utterly devoid of the slightest fact to show that, in performing his customary ministerial duties during the Sheffield trial, Sheriff Waller ever did or said anything to influence the outcome of the case. There was no showing of any injustice done the accused. Articles 508 and 557, Louisiana Code of Criminal Procedure. This point is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 47 to 53.

(e) Federal District Judge's criticism of defense counsel's alleged failure to interview or sequester witnesses.

This specification involves a serious difference in appreciation of the testimony, and an attempt by a federal judge, 18 months after the trial, to substitute his judgment for the judgment of defense counsel at the time of the case as to what should or should not be done then in

dealing with the witnesses. Petitioner's appreciation of the facts is that defense counsel did interview all of the witnesses, did read the statements they had given to the District Attorney, and did use all due diligence and good judgment in handling them in and out of the courtroom. Most significant of all, however, the opinion on habeas corpus fails to point out any different result which could have been accomplished by defense counsel. Suggestion that a possible defense of self-defense might have been developed is precluded by Sheffield's own disclaimer in his statement to the District Attorney of any facts indicating self-defense as the cause of the shooting. Suggestion of a possible defense of emotional instability is not supported by any facts concerning Sheffield brought out in the habeas corpus trial. These matters raised by the Federal District Judge are drawn from the realm of pure speculation—not based on facts substantial enough to upset a murder conviction. If emotional instability will be depended on in mitigation of penalty, the Louisiana Board of Pardons is still open to Sheffield on an application for commutation of sentence. Emotional instability or social maladjustment cannot excuse murder in Louisiana where the offender is capable of knowing right from wrong. This point of failure to interview or sequester (article 371, Louisiana Code of Criminal Procedure) witnesses is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 54 to 58.

(f) Federal District Judge's criticism of failure to exclude juror Lee McMahon.

This point made by the Federal District Judge was so labored that we could scarcely conceive of the necessity

of arguing it, except that it was included in the opinion's cumulation of criticisms of Sheffield's trial. *Ten years before the murder,* another brother of Sheriff Waller, together with his wife, had been killed in an automobile accident. The wife, dead for ten years at the time of Sheffield's trial, had been a sister of the wife of juror McMahon. It was not legal cause for disqualification of McMahon under Louisiana law. *State v. Scarborough,* 152 La. 669, 94 So. 204; Act 135 of 1898, Section 1, of Louisiana; *State v. Dunn,* 161 La. 549, 109 So. 56; *State v. Haney,* 186 La. 465, 172 So. 528; *State v. Phillips,* 164 La. 597, 114 So. 171; *State v. Carter,* 167 La. 1080, 120 So. 864. This point is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 53 to 60.

(g) Federal District Judge's criticism of failure to except to volunteered "bad character" testimony.

During the course of testimony, a witness unexpectedly volunteered a statement that Sheffield was "dangerous." Defense counsel thought it better to ignore the passing remark than to emphasize it to the jury by a request to strike. Volunteering an objectionable remark (even about an excluded confession) is not reversible grounds in Louisiana. *State v. Rugero,* 117 La. 1039, 42 So. 495; *State v. Goodwin,* 189 La. 443, 179 So. 591; *State v. Martin,* 193 La. 1036, 192 So. 694; *State v. Barbarian,* 225 La. 89, 72 So.2d 306. Here is another very clear case of the Federal District Judge "second-guessing" defense counsel 18 months after the trial. Had they excepted to the witness's remark it would have all the more impressed the statement on the jury and yet would have

possessed no value as a bill of exception in the Supreme Court of Louisiana. This point is discussed at length by petitioner's counsel at Transcript, Volume 4, pages 60 to 65.

(h) Federal District Judge's criticism of defense counsel's failure to (1) offer the testimony of Sheffield, (2) or any evidence in his behalf, (3) to ask for any special charges, (4) to reserve any bills of exception, (5) to make any motions for a mis-trial, (6) to make any post-trial motions, or (7) to take any appeal.

We respectfully submit that the foregoing are all destructive criticisms, without any constructive demonstration, either on the habeas corpus trial, or in the reasons for judgment, as to how defense counsel could have supplied these claimed deficiencies under all the facts and circumstances of the case as it came to their hands. Sheffield had made statements after his arrest which he could not have successfully contradicted on the witness stand—why put him on? The opinion makes no suggestions as to what he could have said that would have helped his cause, or what other evidence could have been procured which his counsel might have offered in his behalf. What special charges should defense counsel have requested of the judge?—the opinion does not say. What bills of exception or motions for mis-trial or post-trial motions were possible to defense counsel under Louisiana law? The opinion does not say. How could an appeal on errors of law be taken when the presiding judge ruled so favorably to Sheffield that there were no errors for him to complain of? These matters are more fully discussed by petitioner's counsel at Transcript, Volume 4, pages 65 to 67.

CONCLUSION.

The relief sought by means of this petition for certiorari under 28 U.S.C. 1651(a) is not available in any other court, and cannot be had through any other appellate processes.

Petitioner particularly urges his right to a day in court, to be heard on the indicated errors, on the fundamental ground that federal courts do not have supervisory control over state courts, should be reluctant to interfere by habeas corpus with a state's administration of its criminal law, and should refuse to interfere with judgments of state courts unless very compelling reasons exist for so doing. While on its face, unfortunately, 28 U.S.C. 2253, does not make any distinction between rulings in favor of a state and rulings against a state, insofar as habeas corpus actions in behalf of state prisoners are concerned, logic would suggest that the requirement of a certificate of probable cause as a prerequisite to appeal in that character of cases was inserted by Congress in the law as an added protection to the state's immunity from vexatious litigation and not as an additional handicap to the state's inherent power to police its own affairs in such matters entrusted to the state's sovereignty.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send up to this Court on a day to be designated

a full and complete transcript of the record and of all proceedings in the district court to the end that this case may be reviewed and determined by this Court; that, after due proceedings, the order of the said circuit court, refusing to grant a certificate of probable cause and to take jurisdiction of and hear petitioner's appeal, should be reversed and said circuit court directed to proceed to reinstate and hear and adjudicate said appeal; and that your petitioner be granted such other and further relief as may appear proper.

FRED S. LeBLANC,
Attorney General of Louisiana,
Department of Justice,
State Capitol,
Baton Rouge, La.,

M. E. CULLIGAN,
Assistant Attorney General,
Attorney General's Office,
Court House Building,
Royal and St. Louis Streets,
New Orleans, Louisiana,

HUGH M. WILKINSON,
Special Assistant Attorney General,
1835 National Bank of
Commerce Building,
New Orleans, Louisiana.

HARRY N. ANDERS,
District Attorney, Fifth Judicial
District of Louisiana,
Court House Building,
Winsboro, Louisiana.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1955.

No. .....

HIRAM B. WALLER, Sheriff of the Parish of Franklin, State of Louisiana,

Petitioner,

versus

UNITED STATES OF AMERICA, ex rel JOSEPH SHEFFIELD,

Respondent.

MOTION FOR STAY OF ENFORCEMENT OF JUDGMENT.

Fred S. LeBlanc, Attorney General of the State of Louisiana; M. E. Culligan, Assistant Attorney General, Hugh M. Wilkinson, Special Assistant Attorney General; and Harry N. Anders, District Attorney of the Fifth Judicial District of Louisiana, as counsel for the petitioner above-named, respectfully move this Honorable Court to grant a stay of the enforcement of the judgment sought to be reviewed, and respectfully show:

1.—In the judgment in the United States District Court for the Western District of Louisiana, the decree was that

the writ of habeas corpus in favor of relator Joseph Sheffield should be maintained and that "unless the State of Louisiana grants the said Joseph Sheffield another trial—a fair trial—within six months from the effective date of this judgment, this Court will enter an order commanding the said Hiram B. Waller, Sheriff of the Parish of Franklin, State of Louisiana, to discharge and release the said Joseph Sheffield from custody" (Transcript, page 690 et seq.).

2.—Said judgment was sought to be appealed from, and the appeal has been rejected by the United States Circuit Court of Appeals for the Fifth Circuit, rehearing having been refused on July 18th, 1955.

3.—Movers, interpret this to mean, under the terms of the district court judgment, that unless the State of Louisiana again tries Joseph Sheffield for the murder of John L. Waller, by January 18th, 1956, he, a convicted murderer, will be ordered released from custody.

4.—That petitioner timely applied on July 28th, 1955, for a stay of the mandate of the circuit court (Transcript, page 116) which application for a stay of mandate was denied by the circuit court on July 30th, 1955.

5.—That the mandate has accordingly issued to the district court, and the six months' period for a re-trial of Joseph Sheffield, under the terms of the district court judgment, is presumed to be running since July 18th, 1955, the date of refusal of a rehearing by the circuit court.

6.—That petitioner has, contemporaneously herewith, presented an application for a writ of certiorari under 28 U.S.C. 1651, and has moved for leave to file same in accordance with Rule 31, for the purpose of reviewing the proceedings below which are complained of.

7.—That pending the period of thirty (30) days within which respondent may file a brief in opposition, and pending the determination of whether or not the writ of certiorari shall issue, or pending further proceedings if and after the writ is granted, so much time may run that all or most of the period within which a re-trial of Joseph Sheffield can be held will be consumed.

8.—That, in the interests of eventual justice, it is imperative and urgent that the status quo of the subject matter be preserved and the jurisdiction of this Court protected to pass upon the substantial questions involved, and that the running of the six months' period stipulated by the district court shall be interrupted.

Wherefore, movers respectfully pray that an order of this Honorable Court may be entered fo. hwith, staying the enforcement of any of the terms of the district court judgment until the further order of this Court.

October .... ,1955.

FRED S. LeBLANC,
Attorney General of Louisiana,
Department of Justice,
State Capitol,
Baton Rouge, La.

M. E. CULLIGAN,
Assistant Attorney General,
Attorney General's Office,
Court House Building,
Royal and St. Louis Streets,
New Orleans, Louisiana.

HUGH M. WILKINSON,
Special Assistant Attorney General,
1835 National Bank of
Commerce Building,
New Orleans, Louisiana.

HARRY N. ANDERS,
District Attorney, Fifth Judicial
District of Louisiana,
Court House Building,
Winsboro, Louisiana.

CERTIFICATE OF SERVICE.

I hereby certify under Rule 33(3-b) that service has been made on the relator, Joseph Sheffield, the opposing party, of this petition for certiorari and accompanying motion for leave to file, motion for stay of enforcement of judgment, and appendix of proceedings in the circuit court, by serving a copy thereof by mailing same to Eugene Stanley, Esq., chief counsel for relator, addressed to him at his law office in the Whitney Building, St. Charles and Gravier streets, in the City of New Orleans, State of Louisiana, and deposited first class postage prepaid on the .... day of October, 1955, in a United States mail box in the aforesaid City of New Orleans.

New Orleans, Louisiana, October ...., 1955.

.....

HUGH M. WILKINSON,
Special Assistant Attorney General, State of Louisiana (member of the bar of the Supreme Court of the United States of America).

(All papers and process in connection with this proceeding may be served upon Hugh M. Wilkinson as attorney for petitioner, at or by addressing same to his law office at 1835 National Bank of Commerce Building, New Orleans, Louisiana.)

APPENDIX.

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

APPLICATION OF APPELLANT FOR CERTIFICATE OF PROBABLE CAUSE.

Filed May 6, 1955.

To the Honorable the Judges of the United States Court of Appeals, for the Fifth Circuit:

The application of Hiram B. Waller, the Sheriff of the Parish of Franklin, State of Louisiana, appearing herein through the Attorney General of the State of Louisiana and his designated assistants, and the District Attorney of the Fifth Judicial District of Lousiana, wherein said Parish of Franklin is located, with respect represents:—

1.—That this is an appeal in a habeas corpus proceeding in the Western District of Louisiana, Monroe Division, wherein the District Judge, the Honorable Ben C. Dawkins, Jr., has rendered judgment ordering relator, Joseph Sheffield (held by defendant-appellant sheriff under State process resulting from Sheffield's conviction of the crime of murder) discharged from custody unless he is given another trial within six months from the finally effective date of said decree on habeas corpus.

2.—That decree to such effect was entered in the District Court on January 10th, 1955; on February 7th, 1955,

defendant filed notice of appeal, gave bond for costs, and obtained an order extending the time by 90 days from said date for transcribing the testimony, applying for a certificate of probable cause in the District Court, and for filing the record in the United States Court of Appeals for the Fifth Circuit, which delay will expire May 8th, 1955 (all of which will appear from Volume 3 of the Transcript, pages 690 et seq.).

3.—That upon completion of the task of transcribing the testimony by the court reporter, and after opportunity for a complete review and study of same, counsel for defendant-appellant, with all due diligence and promptness possible, on April 19th, 1955, and within the legal delay allowed for perfecting and filing this appeal, applied at Monroe, Louisiana, to the Honorable Ben C. Dawkins, Jr., the trial judge, for a certificate of probable cause, as required by U.S.C.A., Title 28, section 2253, in a habeas corpus case where the detention is under process of a State court; that the application was supported by a brief in writing setting forth the reasons why, in moving counsel's opinion, the certificate should be granted, and defendant-appellant makes part of his present application, by reference, the said application and supporting brief in the lower court (see re-print of same in full in Volume 4 of the transcript).

4.—That on the same day of the filing of said application and brief, April 19th, 1955, Judge Dawkins granted a hearing on same in chambers, which was also attended by counsel for relator, who filed a written opposition (Transcript, Volume 4, page 70), and Judge Dawkins, at the

conclusion of said hearing, handed down an order refusing said certificate of probable cause (Transcript, Volume 4, page 72).

5.—That under the terms of U.S.C.A., Title 28, section 2253, such a certificate of probable cause, if not granted by the district judge, can be issued by a circuit judge (see also the following comparatively recent Fifth Circuit cases of *Mahoney v. Chapman*, 169 F2d 130, in which your Honors granted the certificate of probable cause and reversed the district court; and *Davis v. Ellis*, 199 F2d 754, *Harris v. Ellis*, 204 F2d 684, *Oliver v. Ellis*, 210 F2d 823, and *Harris v. Ellis*, 194 F2d 604, in which your Honors considered the issuance of a certificate of probable cause but refused to grant same on the grounds that "there was not enough merit" to the appeal, or "no substantial showing of a denial of a federal right", or the "contentions made are without merit", or there was "no probable cause" for an appeal); that all of these cited cases were instances where the prisoner appealed from a refusal by the district court of relief on habeas corpus.

6.—That, unlike the usual run of such habeas corpus actions in the federal courts, the case at bar presents the unusual and infrequent instance of a judgment whereby the prisoner is not refused his liberty, but, on the contrary, has been granted relief *against the State process;* and because of the great seriousness of the case itself (being that of a convicted murderer whose prior convictions is thus proposed to be set aside), and also because of the numerous serious errors committed in his judgment by the district judge, and which errors have

raised sharp conflicts between his ruling and the prevailing Louisiana law and jurisprudence in such matters of criminal procedure, the judgment below is eminently deserving of appellate review, and should be reviewed and said errors corrected and the judgment now complained of reversed and set aside.

7.—That while U.S.C.A., Title 28, section 2253, expresses the intention of Congress "to impose trial limitations upon appeals in habeas corpus cases when the detention was by State process" (U.S., *ex rel Carey vs. Keeper of Prison,* 202 F2d 267, 268, 3rd Circuit), the primary purpose of the limitation is to protect the State process from unjustified interference, whereas in the case at bar the judgment sought to be appealed from actually constitutes an unjustified interference with State process and should be reviewed and set aside.

8.—The certificate should issue where there is a substantial question, or questions for review. *Mahoney vs. Chapman,* 169 F2d 130 (5th Cir.), as liberally exist in the case at bar.

9.—In the case at bar, the appeal of the defendant Sheriff is (1) a serious one, (2) there have been substantial errors of law in the decision complained of, (3) the errors are conspicuous on the face of the record, (4) the possibility is great that a different outcome of the case will be had on appeal, and (5), most essential of all from the abstract viewpoint, there is involved a question of critical public importance in the necessity for the correction of the conflicts between the Federal District

Judge's holdings and the Constitution and statute law of Louisiana and the jurisprudence thereon as announced by the Louisiana Supreme Court.

10.—The Federal District Judge, as explained in the conclusion of his opinion, in reaching his decision on habeas corpus now appealed from, could not rely singly on any specification of failure of due process in the criminal trial of relator, but undertook to base his result upon what he called a "totality of facts"—a phrase adopted by him from the opinion in *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (a case, incidentally, in which, despite such *dicta,* the relief was not extended to Betts which has now been extended to Sheffield); and we interpret the opinion below to mean that the District Judge would not have deemed any of the criticisms he made of Sheffield's trial serious enough, standing alone, to warrant setting Sheffield's conviction aside, but by a process of accumulating these criticisms he nevertheless proposes to justify a finding to such effect and to thus fabricate in his mind a *cumulated procedural error* when none of the component parts were procedural error of themselves; and defendant-appellant now shows that, in all of the matters complained of by the District Judge, taken categorically, the Judge, District Attorney and defense counsel who were conducting the criminal trial of Sheffield complied in all respects with the applicable provisions of the Lousiana Constitution, laws and jurisprudence, and that Sheffield had all due process and a fair trial in every sense of the word under Louisiana law.

11.—That the substance of the District Judge's criticism of Sheffield's trial is directed (1) against the District Attorney for setting the case for trial twelve (12) days after arraignment; (2) against the Judge for not delaying the trial beyond that time; (3) against the Sheriff for continuing to perform the ministerial duties of his office during the trial, despite the fact that he was a brother of the victim of the homicide; and (4) against the defense counsel for not obtaining a continuance, or a change of venue, or recusing the Sheriff, or excluding a certain juror named Lee McMahon, or objecting to certain "bad character" evidence, and for not doing various other things in the trial for none of which had they any legal or factual basis for acting under the laws of Louisiana; and defendant-appellant can show that, in everyone of the instances thus complained of by the Federal District Judge, the State officials and defense counsel conducting the trial proceeded strictly in accordance with Louisiana law; and the Federal District Judge's ruling, therefore, has created a controversial situation as between his Court's understanding of Louisiana procedure in a homicide matter, and what the Louisiana Supreme Court has laid down the law to be, with the result that Louisiana judges, district attorneys, and defense counsel in that Federal district will not hereafter know whether to try such cases according to the Federal District Judge's requirements or according to the law expounded by the Louisiana Supreme Court.

12.—As illustrations of these conflicts, between the judgment complained of and the Louisiana law on the

subject, the defendant-appellant respectfully mentions the following:—

(a)

Although the Louisiana jurisprudence (*State v. Wilson*, 181 La. 61, 158 So. 621; *State v. Roberson*, 157 La. 974, 103 So.283, and cases therein cited; *State v. Johnson*, 36 La. Ann. 852; *State v. Chitman*, 117 La. 905, 42 So.437; *State v. Satcher*, 124 La. 1015, 50 So.835) has repeatedly reviewed the number of days within which a District Attorney may fix a homicide case for trial after defendant's arraignment, and has never reversed except for restriction to six days or less, and has three times affirmatively approved seven days or eight days, the effect of the instant habeas corpus ruling is to hold that *twelve* days' notice is not sufficient, and this ruling is made without indication of specific facts of any aggravated situation by comparison with the situations of the accused in preparing for trial as described in the Louisiana jurisprudence; and for such conflict in procedural law the judgment at bar should be reviewed and set aside.

(b)

The judgment on habeas corpus complained of is contrary to and in conflict with the statutes and jurisprudence of Louisiana as to when, how and under what conditions the continuance of a criminal trial in the courts of Louisiana can and should be sought and obtained (Louisiana Code of Criminal Procedure, Articles 318, 319, 320, 321, 322, 323 and 325); in defense of the re-

quirements laid down in these articles, the habeas corpus ruling holds that, under the conditions and circumstances described in the opinion, defense counsel for relator should have moved for a continuance on the day of trial under penalty of being held guilty of failing to procure "due process", and yet the opinion herein fails to disclose the existence of any facts which, under the codal articles, would have justified the defense counsel in making a sworn, written application for a continuance, or would have authorized the trial judge to grant it; and for such conflict in procedural law, the judgment at bar should be reviewed and set aside.

(c)

The judgment on habeas corpus complained of is contrary to and in conflict with the statutes and jurisprudence of Louisiana as to the circumstances under which a change of venue can and should be sought and obtained (Louisiana Code of Criminal Procedure, Articles 290, 292 and 293); and is also contrary to the jurisprudence that fair and impartial jury consideration of a case cures failure of change of venue (*Stachline v. Destrehan*, 2 La. Ann. 1019; *State v. Abshire*, 47 La. Ann. 542, 17 So.141; *State v. Blount*, 124 La. 202, 50 So.12; *State v. Roberson*, 159 La. 562, 105 So.621); that no *facts* are afforded by the opinion to indicate either that there was any legal justification for a change of venue when the trial of Sheffield began, or that there was any unfairness, partiality or prejudice shown by the jurors during the course of the trial or in their deliberations and verdict; that the citing of two local newspaper articles as evidence of cause for

change of venue falls far short of legal grounds for same (*Shushan v. United States*, 117 Fed. 2d, at pages 115 and 116) and there is a total absence of showing in the hearing on habeas corpus of the existence of any facts which, under the law of Louisiana, would have enabled defense counsel to seek a change of venue or warranted the trial judge in ordering such a removal of the case; and for such conflict the procedural law, the judgment at bar should be reviewed and set aside.

(d)

The holding of the United States District Court is flagrantly in conflict with Louisiana law as to the duty of defendant sheriff (a brother of the victim of the shooting) to have recused himself from his customary official duties at the trial; whereas, the opinion assumes Sheriff Waller was "required" by the Louisiana Constitution to recuse himself, the contrary is true; a sheriff in Louisiana can be recused or recuse himself only when he is *a party to the litigation* in which he is called upon to serve (Constitution of Louisiana of 1921, Article VII, section 71; Title 13, section 3334, Revised Statutes of Louisiana of 1950; *State v. Judge of Ninth Judicial District*, 11 La. Ann., at page 80); that Sheriff Waller, not being a *party* to the litigation between the State of Louisiana and Joseph Sheffield, could not have legally recused himself, and the contention is unsound that there was want of due process because he performed his constitutional duties during Sheffield's trial; that, furthermore, no *fact* is indicated in the opinion to show that Sheriff Waller, by word or deed, conducted himself in

any way to prejudice the accused, and, under the law of Louisiana, *"harmless error"* can not be asserted as a ground for reversal of a criminal conviction (Articles 508 and 557, Code of Criminal Procedure of Louisiana); and because of the conflict with the Louisiana constitution, statutes and jurisprudence, the holding of the habeas corpus judgment on this point should be reviewed and corrected.

(e)

Alleged failure of defense counsel, appointed by the court, to interview or sequester witnesses is not borne out by the established facts, as to the interviewing of witnesses, or by the law, as to the failure to sequester witnesses; the record showing that the defense counsel, at one time or another before trial, talked to every material witness to the facts of the crime, and examined all statements taken from witnesses and reduced to writing by the District Attorney; that there is not presented by the record, or pointed out in the opinion, any specification of facts not in the possession of defense counsel at the time of trial except two suggested items: (1) that one eye-witness, a Mrs. Pilgrim, could have given testimony tending to corroborate a plea of self-defense; and (2) that emotional instability of the accused might have been further inquired into. That, as to Mrs. Pilgrim's information, it was not (a) given in her statement to the district attorney before the trial, and (b) it was not testified to by her when she took the witness stand on the trial, (c) the theory of self-defense was inconsistent with the accused's own voluntary confession and with the evi-

dence of other eye-witnesses, and (d) Mrs. Pilgrim's inconsistent declaration was made long after the trial. As to the question of emotional instability, even if it existed, which no *facts* are indicated in the opinion to show, it would not have constituted a *defense* under Louisiana law, and as to *mitigation* of the punishment for the crime, the Louisiana Board of Pardons is available for such relief at all times. As to the discretion of defense counsel not to sequester witnesses during the trial, no *facts* indicating error to have resulted from permitting the witnesses to mingle are apparent from the record, and the holding on this point of the habeas corpus ruling is inconsistent with Louisiana law (Article 371, Code of Criminal Procedure, and authorities cited in first and last foot-notes at bottom of page 210, Dart's annotated code) to the effect that refusal to order sequestration of witnesses will not be interfered with unless there has been an abuse of discretion *to the hurt of the accused*, and should be reviewed and corrected.

(f)

That the holding of the opinion on habeas corpus that the juror, Lee McMahon, was incompetent to serve, because he was married to a sister of a deceased wife of a deceased brother of the victim of the shooting, *both the sister and the brother having been dead for ten years previous to the relator's trial*, is in conflict with Louisiana law that a remote relationship by affinity (what can be more remote than a relationship which has been non-existent for ten years?) can not render a venireman incompetent for jury service in a particular case. *State v. Dunn*, 161 La. 549, 109 So.56; *State v. Scarborough*, 152 La. 669, 94 So.204; Act 135 of 1898 of the

Legislature of Louisiana, sec. 1; *State v. Haney,* 186 La. 465, 172 So.528; *State v. Phillips,* 164 La. 597, 114 So.171; *State v. Carter,* 167 La. 1080, 120 So.864), and the ruling on this point should be reviewed and corrected.

(g)

That an unexpected and volunteered statement by the State's witness, Travis Bass, purporting to reflect on the "dangerous" character of accused, whose good character had not been put at issue, has been held in the habeas corpus ruling to constitute error, since it was not objected to by defense counsel or the jury instructed to disregard it by the judge; that, even if the discretion exercised by defense counsel, not to emphasize the volunteered remark of the witness by objecting to it, was not sound, which is denied, nevertheless the ruling is in conflict with the Louisiana jurisprudence which holds that the trial of a criminal offense can not be defeated or nullified by the act of a witness in making a statement which he should not make and for which the prosecution is not responsible (*State v. Rugero,* 117 La. 1039, 42 So.495; *State v. Goodwin,* 180 La.443, 179 So.591; *State v. Martin,* 193 La. 1036, 192 So.694; *State v. Barbarian,* 225 La. 89, 72 So 2d 306) and the ruling in this particular should be reviewed and corrected.

(h)

That the other matters complained of in the ruling on habeas corpus, to-wit: failure of defense counsel to offer the testimony of relator or any evidence in his behalf, or ask for any special charges, or to reserve any bills of exception, or to make any motions for a mistrial, or other

post-trial motions, or to take any appeal, are all largely cumulative, in that they depend for justifiable complaint upon the validity or legality of the points heretofore discussed, and shown not to have been sound and well-founded in Louisiana law; that, furthermore, each of the procedural steps referred to, and said to have been neglected by defense counsel as an element of lack of due process, are procedural matters which, under the laws of Louisiana, must be predicated on certain precise issues of law or fact; and it is now shown in the ruling now appealed from that, in any instance, there was a presence in the trial of an issue of law or fact which would have enabled defense counsel to do any of the things which it is thus said they should have done; and since such a holding generally conflicts with those provisions of Louisiana law applicable to such trial situations, the holding in these more general and cumulated particulars should also be reviewed and corrected.

13.—That the ruling of the Federal District Judge on habeas corpus, contrary to the Louisiana Constitution, statutes and jurisprudence, as outlined in the foregoing, not only works an injustice to the State of Louisiana in the case of Sheffield himself, but it has raised serious conflicts with State procedural law affecting other and future proceedings in all judicial districts of the Western Division and undertakes to set up different standards of procedure in homicide cases from those established by State law; and thereby creating a question of considerable public importance which the chief law officer of the State of Louisiana, the Attorney General, deems to necessitate prompt review, and correction thereof if such correction be found deserved, to the end that both the

relator, and the enforcement of the criminal law under the police power reserved by the States, may have full and fair examination and be done eventual justice; and defendant-appellant makes part of this application the brief in support of the same application in the lower court (which will be found reproduced in Volume 4 of the transcript) and respectfully asks that said brief may be read and considered in support of the present application.

Wherefore, the applicant respectfully prays that this Honorable Court may recognize the existence herein of a meritorious appeal, and substantial grounds in law for appealing, and the reasonable possibility of a different outcome of the case on appeal, and may accordingly grant to defendant-appellant a certificate of probable cause for the taking of the appeal, as provided for by U.S.C.A., Title 28, section 2253; and for any and all orders necessary and proper in the premises.

FRED S. LEBLANC,
Attorney General of Louisiana.

By M. E. CULLIGAN,
(M. E. Culligan),
Assistant Attorney General.

HUGH M. WILKINSON,
(Hugh M. Wilkinson),
Special Assistant Attorney General.

HARRY N. ANDERS,
(Harry N. Anders),
District Attorney, Fifth District of Louisiana.

New Orleans, Louisiana, May 6th, 1955.

I certify that a copy of the foregoing application is being this day delivered to Eugene Stanley, Esq., opposing counsel.

May 6, 1955.

(Signed) HUGH M. WILKINSON.

OPPOSITION OF APPELLEE TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE.

Filed May 23, 1955.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE YOUR HONORS:

After a trial shocking to the civilized conscience and therefore repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, relator was convicted of the crime of murder by a court of the State of Louisiana and sentenced to die in the electric chair. An application for a Writ of Habeas Corpus was duly presented (Transcript of Record 494) to the United States District Court for the Western District of Louisiana, and after a hearing lasting nearly four days, in which nineteen witnesses were heard, District Judge Ben C. Dawkins, Jr., granted relator the relief demanded. The District Court thereafter denied respondent's request for a certificate of probable cause, without

which, under 28 U.S.C. Sec. 2253, respondent cannot appeal, and in opposition to respondent's request for such certificate, we respectfully submit:

STATEMENT OF THE CASE.

Rule 52 (a), *Fed. R. Civ. Proc.*, requires that the District Court's "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Since the trial court's findings of fact are abundantly supported by the evidence, a detailed analysis of the testimony would unnecessarily lengthen this reply brief. (A table on Page 83 hereof will readily lead from the court's findings to their basis in the Transcript of Record. The following statement of the case will therefore not refer to the record except when the facts stated were not expressly mentioned in the opinion below or when their extraordinary importance warrants such reference.)

On June 14, 1953, John Waller, a Deputy Sheriff of Franklin Parish, State of Louisiana, died of shotgun wounds allegedly inflicted by relator on that date. His brother, Franklin Parish Sheriff Hiram B. Waller, a popular and influential political figure in the rural community, immediately returned from California (84). Naturally, the community was aggrieved and excited by his brother's violent death. (283, 294, 295). Some spoke of an "open season" on law enforcement officers, refusing to a State

Trooper's violent death in a nearby community only a few days before. (294). Local officials moved quickly. Three days after the fatal shooting, relator was indicted for the murder of John Waller by a Grand Jury called into special session for that purpose. Later in the same day he was arraigned before the district court for Franklin Parish.

Relator was a penniless, 24-year old youth with a sixth grade education, reared in a poor sharecropping family and the victim of a broken home (214). Prior to his indictment, one of the attorneys subsequently appointed to assist him in his defense, mentioned to the trial judge in conversation the impending necessity of appointing counsel for relator and suggested that the entire local bar be appointed (394). In this fashion was the reputation of every attorney in the close-knit community to be safeguarded from the stigma of championing alone so maligned a cause. In the same conversation, the probable date of trial was discussed (indictment was apparently a foregone conclusion). With a court vacation scheduled for the near future, the trial judge made his views in this regard unmistakably clear by handing the attorney two citations indicating that, under certain circumstances, the Louisiana Supreme Court had held that six of seven days between arraignment and trial was an adequate delay (394, 393, 521, 529, 535).

On the morning of the arraignment, the entire eligible bar, four attorneys, were appointed to assist relator in his defense. One was later—by default—shouldered most of the responsibility, was called out of semi-retirement

(518, 517) by messenger (520). Later, on the day of the trial, a fifth attorney, who lacked the five years' experience required for appointment in a capital case, associated himself in the case at the request of the other four. But this occurred only after considerable cajoling by the other four (419, 422, 423, 435), aimed at making the representation of the local bar, to use his words, "unanimous" (422, 447). Two attorneys were not appointed because, as close relatives of the District Attorney, they could not have been (422). Thus at the arraignment, relator was represented by the entire eligible bar—"fellow sufferers" (446)—who allowed him to plead "I guess I'm guilty" (358, 361) to an indictment under which an unqualified plea of guilty cannot be received (La. R.S. 15:262). Eventually, a plea of "Not Guilty" was entered, however, and the trial was set for June 29, twelve days after arraignment, fifteen days after the alleged shooting. No time was being lost.

With the odium and the responsibility of representing relator thoroughly diffused, appointed counsel went through some of the motions of preparing relator's defense. But their heart was not in their work. Of the two persons who were unquestionably eye-witnesses to the fatal shooting, one was not interviewed at all by counsel, although she was a known friend of relator and had attempted to tell the district attorney prior to trial (667-668, 113) and, at the hearing below, did tell a version of the shooting extremely favorable to relator (110). This witness did give the District Attorney a statement unfavorable to relator, but only after being kept in jail for two days with her five children. Counsel

was content simply to examine this statement. Only the Game Warden who had been in deceased's company at the time of the shooting was interviewed thoroughly. Other than the mother and step-father of relator, who were contacted briefly in the presence of a young boy of twelve (223, 466) none of the other thirteen witnesses who testified at the trial of relator were interviewed prior to the day of trial. Counsel simply relied upon statements taken from them by the District Attorney, none of which were copied, requested, offered, or otherwise obtained (506, 523, 592). Clearly, counsel had concluded that an appeal to the mercy of the jury was the best way to shed the responsibility of their unpopular task (647). In the end, this appeal lasted about fifteen minutes (269, 288, 489).

On the day after the arraignment and again four days before trial, the local weekly carried highly inflammatory articles concerning the crime with which relator was charged (675 *et seq.*) these could not humanly have been ignored by the jury (283, 284, 295). But neither this nor anything else (See page 70 hereof) induced counsel to seek a change of venue to assure the selection of an impartial jury. Nor did counsel seek a continuance in order to fully investigate the facts of the fatal shooting and inquire with the aid of experts into relator's strange emotional character (346, 153, 157, 192, 193, 207, 208, 265, 273, 566). But if the local bar did little to assist relator before trial, so much less was done during the trial that people of the community referred to the trial as a hasty (199, 200, 270), unfair (200, 210, 560, 561) Kangaroo Court (184), fixed by the Sheriff for his brother

(184), in which relator's lawyers didn't help him (184) and which simply "wasn't right" (184). Was this public condemnation of the trial unwarranted?

(1) The examination of prospective jurors was perfunctory (286, 296, 297). One venireman who —unknown to counsel (487, 604, but see 431, 542)—was married to the sister of the deceased' erstwhile sister-in-law, was accepted for service (64, 603, 184). See page 78 hereof.

(2) The Sheriff, *brother of the deceased*, officiated at the trial. He drew the name of jurors from an envelope (58, 85, 103, 366); summoned additional talesmen (89); took two jurors who had been accepted, to lunch, with no one else present (61, 62, 603); took six to lunch about a mile from the courthouse (86, 63), with a deputy accompanying the other six in another car. He testified (77). His chief deputy (97) and a hand-picked special deputy (97, 99, 147, 148) remained with the jury overnight in their sleeping quarters. He drove to the country to notify a woman of her husband's selection as a juror (100). Moreover, there is evidence in the record that, seated in a presiding position in the witness chair during the examination of veniremen (73), he exerted influence on the District Attorney's choice of jurors (160, 198, 199). Counsel appointed for relator uttered not a murmur of protest to this danger-laden situation (434, 533, 602). See page 72 hereof.

(3) Counsel made no attempt to have the witnesses sequestered or placed under the rule (119, 395, 426, 470, 536, 596). They were thus allowed to overhear the testimony of all other witnesses and revise their own to accord with the consensus (536), See Page 75 hereof.

(4) One witness, whom the District Attorney kept in jail with her five children for two days without charge, and then threatened with more of the same if she didn't give the "right" statement (113, 116, 121, 124, 132, 666, 667, 668, 669), was called to the witness stand by the State. When her testimony began to deviate from the statement given to the District Attorney, he was allowed to impeach her credibility by means of this statement—Counsel made no objection, requested no instructions to the jury, did not cross-examine or attempt to rehabilitate her (127, 137, 430).

(5) A deputy Sheriff called by the State testified, without protest from counsel, that relator was "dangerous", that he "might kill", that he had bought "buckshot" shortly before to kill the witness (37, 39, 40, 601). Although the remark was unquestionably accentuated in the jury's minds by counsel's "holding up" the proceedings momentarily (471), they took no defensive action whatsoever. See page 78 hereof.

(6) Without protest from counsel (616), the widow of the deceased was allowed to take the stand and, in an emotional state, testify to completely irrelevant matters, such as her last few moments with the deceased (616, 615, 618).

(7) Without protest from counsel, an undertaker was allowed to exhibit the deceased's bloody shirt to the jury, although this had no relevance whatsoever (646).

(8) During the trial, only two of the five attorneys for relator sat at the table where counsel usually sit. The other three conducted relator's defense from chairs placed against the rail (287, 300, but see 439).

(9) The elderly attorney who had been called out of semi-retirement on the morning of relator's arraignment, was in complete charge of the defense, the others being of counsel *pro forma* only (156, 163, 287, 371, 306, 439, 464, 541, 588).

(10) The address to the jury was delivered in a low tone of voice (155) by the elderly attorney, who made no suggestion to the jury of reasonable doubt, accident, or self-defense, but instead asked for mercy for about fifteen minutes (269, 288, 489, 490, 290, 368, 613, 647).

(11) No evidence whatsoever was offered in relator's behalf.

(12) If any objections were raised by counsel during the trial, they were very few in number (287, 377).

(13) No special charges to the jury were requested (476, 493, 541, 648).

(14) No defensive motions were filed by counsel before, during, or after the trial. Although the record of the proceedings was devoid of signs of resistance to the prosecution, a motion for a new trial could have been based upon errors patent on the face of the record:

(a) Which showed that the brother of the deceased, as Sheriff, was in charge of the jury. See page 72 hereof.

(b) Which also showed that the entire eligible bar had been appointed to assist counsel in his defense. See Page 58 hereof and reference to Powell v. Alabama.

(15) Counsel for relator made no attempt to appeal or to seek relief from the Louisiana Board of Pardons.

On June 30, 1953, the day after the trial began and sixteen days after the alleged shooting occurred, the jury returned a verdict of guilty as charged. Three days later, relator was sentenced to death.

II.

None of the following action was taken by counsel appointed to represent relator on trial:

On December 22, 1953, relator attempted to file in the Fifth Judicial District Court for the Parish of Franklin a motion for a new trial, based upon allegations that the failure of counsel to assist him diligently in the

conduct of his defense rendered the proceedings repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and certain provisions of the Constitution of the State of Louisiana. On December 26, 1953, relator's motion for a new trial was returned to him by the Clerk of that court with the explanation that the Honorable Judge thereof had ordered its return because it had been filed too late. Thereupon, relator applied to the Supreme Court of Louisiana for Writs of Certiorari, Mandamus, and Prohibition, which were refused, for reasons appearing on page 94 hereof, in a judgment rendered in that court on February 15, 1954, which has never been reported. From that judgment, relator sought a Writ of Certiorari in the Supreme Court of the United States, which was refused on October 14, 1954, but *"without prejudice to petitioner to apply to the appropriate United States District Court for a Writ of Habeas Corpus."* Thereafter, on November 3, 1953, relator filed an application for a Writ of Habeas Corpus in the United States Distict Court for the Western District of Louisiana. After a hearing which lasted nearly four days and in which nineteen witnesses were heard, the case was submitted to District Judge Ben C. Dawkins, Jr., on the following authorities:

ARGUMENT ON THE MERITS.

I. The Fourteenth Amendment to the Constitution of the United States required that the State of Louisiana appoint counsel to assist relator in his defense.

II. The Fourteenth Amendment required more than an empty gesture, more than the mere formal appointment; it required also that appointed counsel render effective and substantial assistance to relator.

III. Even if relator had had no federal right to the appointment and vigorous assistance of counsel, the State's readiness to acquiesce in the lassitude of counsel once appointed amounted in effect to a fraudulent deception of relator, in violation of his right to a fair trial under the Fourteenth Amendment, by lulling him with a technical appointment into a false sense of security and thereby in effect preventing him from obtaining the effective assistance of employed counse' through "last-resort" measures.

IV. Consequently, either the State's failure to provide relator with the substantial and effective aid of counsel to which he had a federal right, or the State's acquiescence in the lassitude of appointed counsel, or both, deprived relator of his liberty and threatens to deprive him of his life without Due Process of Law, in violation of the Fourteenth Amendment.

I. The Fourteenth Amendment to the Constitution of the United States Required that the State of Louisiana Appoint Counsel to Assist Relator in his Defense:

In *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 45, (1932) the Supreme Court of the United States decided that "*in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeblemindness, illiteracy, or the like, it is the duty of the court, whether requested or not to assign counsel for him as a necessary prerequisite of due process of law.*" *Id.* at 71. (Italics supplied.) Petitioners in that case had been convicted of the crime of rape by an Alabama court and sentenced to death. Prior to trial, all members of the local bar had been appointed by the trial judge "for the purpose of arraigning the defendants and then of course" he "anticipated them to help them if no counsel appears." *Id.* at 56. The opinion sets forth a lengthy colloquy between the trial judge and several attorneys when petitioner's case was called, the end result of which was an inconclusive assurance by one local attorney to assist an out-of-state attorney if the latter should need it. *Id.* at 53. Of this the court said, "(I)n this casual fashion the matter of counsel in a capital case was disposed of." *Id.* at 56. The only assignment of error considered by the Court in that case concerned the denial to petitioner of the aid and assistance of counsel by the State court. The Court referred to "(t)he words of Webster, so often quoted, that by 'law of the land' is intended 'a law which hears before it condemns' ", and continued:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

> heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence .... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect?" *Id.* at 68.

The conviction was reversed.

This decision, that "in a capital case, where the defendant is unable to employ counsel and is incapable of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary prerequisite of due process of law", with its logical extension to certain non-capital cases, has been repeatedly affirmed. *Palmer v. Ashe,* 342 U.S. 134, 96 L.Ed. 154 (1951); *Gibbs v. Burke,* 337 U.S. 773, 93 L.Ed. 1686 (1949); *Uvreges v. Pennsylvania,* 335 U.S. 437, 93 L. Ed. 127 (1948); *Townsend v. Burke,* 334 U.S. 736, 92 L.Ed. 1690 (1948); *Wade v. Mayo,* 334 U.S. 672, 92 L.Ed. 1647 (1948); *In re Oliver,* 333 U.S. 257, 92 L.Ed. 682 (1948); *DeMeerleer v. Michigan,* 329, U.S. 663, 91 L. Ed. 584 (1947); *Hawk v. Olson,* 326 U.S. 271, 90 L. Ed. 61 (1945); *Rice v. Olson,* 324 U.S. 786, 89 L.Ed. 1307, (1945); *House v. Mayo,* 324 U.S. 42, 89 L. Ed. 739 (1945); *Tomkins v. Missouri,* 323 U.S. 485, 89 L. Ed. 409 (1945);

Williams v. Kaiser, 323 U.S. 471, 89 L. Ed. 398 (1945); *Smith v. O'Grady*, 312 U.S. 329, 85 L. Ed. 859 (1941).

Therefore, it is submitted that relator was entitled to have the State court appoint counsel to aid in his defense as a matter of constitutional right. He was tried for the commission of a crime punishable by death and was in fact sentenced to death. Moreover, at the time of the trial, relator was only twenty-four years of age. He had received only a sixth grade education in a country school and had been reared in one of the poorer families in the Parish of Franklin. His experience was only that of a common laborer in the humblest walks of life. The complexities of criminal procedure were to him a complete mystery. He could not constitutionally have been cast to shift for himself in the labyrinth of intricate safeguards incident to the trial of a capital case. Relator is grateful to the State of Louisiana for appointing counsel to assist him; but:

II. The Fourteenth Amendment Required More than the Mere Act of Appointment; it Required that Appointed Counsel Render Substantial and Effective Assistance to Relator:

The right to representation by counsel necessarily carries the implication that the representation must be effective. This was decided in *Powell v. Alabama*, *supra*, where, after holding that it was the duty of the state court to assign counsel for the indigent accused, the Court continued: "(T)hat duty is not

discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aide in the preparation and trial of the case." *Id.* at 71. "There the trial court appointed the entire bar of the county as counsel, but what was everybody's responsibility became no one's responsibility, and the imposing array of counsel just went through the motions of giving the defendants a trial. That was a denial of due process because it destroyed the essential integrity of the trial." Minton, Circuit Judge, speaking of *Powell v. Alabama in United States ex rel. Weber v. Ragen,* 176 Fed. 2d. 579, 586 (7th. Cir. 1949). Again, in *Avery v. Alabama,* 30 8 U.S. 444, 450 (1940), the Court stated: "The Constitution's guarantee of assistance of counsel cannot be satisfied by a mere formal appointment". The Court in that case, however, found that counsel's "appointment and representation rendered under it were not mere formalities, but petitioner's counsel have—*as was their solemn duty*—contested every step of the way leading to final disposition of the case." (Italics supplied.) The necessity of vigorous and effective assistance of counsel as an essential corollary and implementation of the right to the appointment of counsel is too plain to be argued about at length. It served as one of the grounds of decision in *House v. Mayo,* 324 U.S. 42, 44 (1945) and was referred to as settled in *White v. Ragen,* 324 U.S. 760, 764 (1945). It has received recognition in other federal courts. Thus, in the Fifth Circuit, where a negro charged with rape of a white woman met court-appointed counsel only an hour before trial, and the

lawyer did not ask for a continuance or change of venue because of the presence of a large, unruly mob, due process was held denied. *Downer v. Dunaway*, 53 Fed. 2d. 586 (5th Cir. 1931), *writ granted* 1 F. Supp. 1001 (M.D. Ga. 1932).

See also, *Jones v. Commonwealth of Kentucky*, 97 Fed. 2d, 335 (1938); *United States ex rel. Mills v. Ragen*, 77 F. Supp. 15 (N.D. 111, 1948). As to incompetent counsel, see *United States ex rel. Hall v. Ragen*, 60 F. Supp. 820 (N.D. 111. 1945) and *United States ex rel Foley v. Ragen*, 52 F. Supp. 265 (N.D. 111 1943), wherein the court said: "The right to the assistance of counsel means more than the mere nominal designation by the court of a lawyer to represent the accused and the mere perfunctory participation in the trial of such appointee. It means, rather, that the accused is entitled to . . . good faith assistance. . .". See also Annotations, 93 L. Ed. 137 (1950); 84 L. Ed. 383 (1940); 96 L. Ed. 161 (1952); 94 L. Ed. 1193 (1950); 146 A.L.R. 369 (1943); 84 A.L.R. 527 (1933); 38 A.L.R. 2d 1401 (1954); 20 A.L.R. 2d 988 (1951); 70 A.L.R. 817 (1931); 42 A.L.R. 1157 (1926).

III. Even if Relator had had no Federal Right to the Appointment and Vigorous Assistance of Counsel, the State's Readiness to Acquiesce in the Lassitude of Counsel Once Appointed Amounted in Effect to a Fraudulent Deception of Relator, in Violation of His Right to a Fair Trial Under the Fourteenth Amendment, by Lulling Him with a Technical Appointment of Counsel into a False Sense of Security and Thereby in Effect Preventing Him from Obtaining the Effective Assistance of Counsel Through "Last-Resort" Measures:

The state action condemned in *White v. Ragen*, 324 U.S. 760 (1945) differed from the mere *pro forma* appointment of unwilling counsel only in degree. The petitioner in that case alleged that counsel appointed to assist him would do nothing for him without pay. When petitioner asked him to call a witness, he replied that he didn't have time and that petitioner should plead guilty. Petitioner then asked the trial judge to continue the case to permit petitioner to call a witness and confer with his attorney, to which the judge replied that petitioner must keep still, that his attorney would do the talking for him. This the Supreme Court quite naturally considered a prima facie case of denial of due process.

The act of appointing counsel for an indigent accused is likely to cause his relaxation, a state from which, like relator here, he might awake only too late. If appointed counsel fails to conduct the accused's defense with vigor and a proper regard for his rights, the accused has in fact been misled by

the State into relying on its generosity, and has in effect been prevented by the State, through a sinister trickery, from employing effective counsel. Common sense makes it obvious that many a penniless defendant might, by appeals to the sentiments of his family, his friends, or wealthy philanthropists, obtain enthusiastic and energetic counsel were he not led to believe that such appeals are unnecessary for the protection of this right. A State's willingness to acquiesce in the lethargy of appointed counsel is therefore an actual prevention of indigent accused from obtaining the effective aid of counsel. Certainly such an active obstacle to a fair hearing in a capital case or any other case would be universally considered a flagrant deprivation of Due Process of Law. See *Powell v. Alabama*, 287 U.S. 45 (1932). Can the inaction of a State, having the same effect, be considered, only because more subtle, less repugnant to "the fundamental principles of justice and liberty which lie at the base of all our civil and political institutions?" *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

IV. Consequently, Either the State's Failure to Provide Relator with the Substantial and Effective Aid of Counsel to which he had a Federal Right, or the State's Acquiescence in the Lassitude of Appointed Counsel, or Both, Deprived Relator of Liberty and Threatens to Deprive Him of Life Without Due Process of Law, in Violation of the Fourteenth Amendment:

The Louisiana State Bar Association appointed a special committee to investigate the circumstances

of relator's trial and conviction. As appears more fully in Richard B. Montgomery, Jr., *Report of the President,* 1 LOUISIANA BAR JOURNAL No. 3, pp. 8-11 (April, 1954), the Board of Governors of the State Bar Association voted to approve the report of the committee, which concluded as follows:

> "The Committee is of the fervent opinion that the trial of young Sheffield was such as to shock the conscience of those of us who still believe that even the guilty are entitled to such a trial, particularly in a capital case, as conforms to the American conception of justice. * * *"

The President stated *(Id.* at 9), "The Board believed unanimously that Sheffield had not received a fair and constitutional trial."

Surely the facts of this case support that conclusion. The appointment of the entire eligible local bar might, standing alone, support it. In the words of Sutherland, J., in *Powell v. Alabama,* 287 U.S. 45, 56 (1932): "(I)n the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and designated." But if that were not alone sufficient, it is respectfully submitted that abundant evidence may be found in the Statement of the Case, which repeating here would unnecessarily lengthen this long brief, to show that relator was

convicted and sentenced to death without the substantial and effective aid of counsel, and thereby deprived of his liberty and jeopardized in his life without Due Process of Law.

Present counsel for relator regret that what may be understood as an attack on the conduct of their professional brethren must be made. No ill will lies at the root of the unpleasant task. However, a man's life hangs in the balance, and it would approach professional misconduct to mince words.

Not only relator's life is at stake in this proceeding, however; every man and certainly every penniless, ignorant and defenseless man like relator should note, if he can, what is decided here. For if the consciences of public officials are hardened by this or any other court's acquiescence in trials of the sort that took relator's right to live, then the infamous knock on the door in the middle of the night and, within the hour, condemnation of helpless citizens to death or imprisonment, will await only an appropriate occasion to make an appearance within the borders of this land of Free Men.

OPINION OF FEDERAL DISTRICT COURT.

On the basis of the "totality of facts", *Betts v. Brady*, 316 U.S. 455, 462, 86 L. Ed. 1595 ( ), the United States District Court concluded that relator had been tried and convicted in violation of Due Process of Law (Tr. 689) and, on January 10, 1955,

ordered that "unless the State of Louisiana grants the said Joseph Sheffield another trial—a fair trial—within six months from the effective date of this judgment, this Court will then enter an order commanding the said Hiram B. Waller, Sheriff of the Parish of Franklin, State of Louisiana, to discharge and release the said Joseph Sheffield from custody". (Tr. 692.)

In order to show the correctness of the written opinion on which this order is based, or to show that it is free from substantial error, it is of paramount importance to determine what was actually decided by the District Court. We do not propose to read "true" meanings into plain language, but that the opinion is perhaps subject to misinterpretation is fully demonstrated by respondent's application and brief herein.

In the first place, it is an extremely significant fact that the opinion of the District Court does not once state that relator lacked the effective assistance of counsel. While that is implicit in every line of its opinion, it is never once stated. On the contrary, the District Court virtually offered an apology for criticizing "unduly" the trial tactics, sincerity, or lack of zeal on the part of relator's appointed counsel and indeed attempted to divert blame for their serious omissions to an abstraction, "haste". With this studied solicitude for the reputations of defense counsel present counsel for relator have no quarrel. But we submit that the charitableness of the Dis-

trict Court's opinion should not be permitted to obscure the very basis of its decision, implicit throughout its discussion of the case, namely, that relator had been unconstitutionally deprived of the diligent and effective assistance of counsel.

Deprivation of effective counsel in adversary proceedings almost necessarily results in a one-sided affray. Consequently, any intimation in the District Court's opinion concerning the conduct of the District Attorney, the Sheriff, or the Trial Judge is, we submit, necessarily secondary to what the court "truly" held as discreetly as possible, that is, that this conduct would probably not have been possible had relator enjoyed the full assistance of counsel.

Thus it would seem to follow that the District Court's opinion is incorrect only if respondent can show that no doubt could have existed about the propriety of the proceedings, and as a result, no reason to expect counsel to question their propriety. The record, of course, consisting as it does of the unrecorded remembrances of reluctant witnesses, cannot show all the questionable aspects of the trial which defense counsel failed to question. The District Court's opinion, as well as counsel for relator, was content to present the most flagrantly illustrative doubts that defense counsel consistently resolved against their client.

By thus calling a spade a spade, however, we ask the court to understand that we do not question the

District Court's view that the "totality of facts" in this case indicated a lack of Due Process in the proceedings. It needs no citation of authority to state that Due Process consists essentially of such inexpressible, composite views of "the fundamental principles which lie at the base of all our civil and political institutions". *Hebert v. Louisiana,* 272 U.S. 312, 316 (1926). But in order to defend (as well as to criticize) the District Court's opinion, it is necessary to isolate, if possible, the main component of the "totality". We respectfully submit that the opinion of the District Court unmistakably shows that this component in the present case is the lack of diligent representation by counsel appointed for relator.

As already indicated, it was necessary for the District Court to show what might have been done—what relator had a right to expect would be done—and to compare this with what was in fact done by appointed counsel. This we submit, the District Court did painstakingly, adroitly, and discreetly. The crux of respondent's complaint with that opinion is, as we understand it, an attempt to show that what the District Court has indicated would have been done by diligent counsel could not, under local procedure, be done. Reasoning from this conclusion, which we believe we can prove false, respondent then asserts the existence of a question of extreme public importance in the alleged conflict between the District Court's opinion and local procedure.

Here, perhaps, the obvious should be noted in passing. The mere existence of a conflict between a federal court's view of Due Process and the procedure followed by a particular state in a given proceeding by no means brands the federal view as erroneous. If a state provided for the trial of murder cases on the day of the victim's funeral, at the cemetery, with the jury in charge of the next of kin, can it be doubted that these matters of continuance, venue, and "ministerial duties" of the officer in charge of the jury would not be sanctioned by the United States Supreme Court? To assert categorically that a federal court has no power to question state criminal procedure is to turn one's back on hundreds of the United States Supreme Court's decisions and a century of progress. But it seems unnecessary to place much reliance on the supremacy of the federal judiciary in matters of Due Process in order to meet squarely respondent's contentions. For counsel respectfully submits that any suspicion of conflict between the District Court's opinion and state procedure can be dispelled by showing (1) what the District Court actually held on the points enumerated by respondent, and (2) that wherever the District Court held anything with regard to those points, the holding has not been, and cannot be shown to conflict with state law. We shall discuss these "conflicts" in the order in which respondent's application presents them:

I.

THE ELEMENT OF TIME.

(A)—Haste of the Proceedings:

A careful reading of the second paragraph of the District Court's opinion will show, we submit, that the haste to which the District Court pointed was the brief interval between the fatal shooting and the commencement of trial, fifteen days, or between the shooting and ultimate sentence, nineteen days. None of the decisions of the Louisiana Supreme Court cited by counsel for respondent are relevant in determining whether this short interlude was indicative of haste. Every one deals with the question of improper delay between *arraignment* and trial.

Moreover, the only decision cited where it appears that the defendant was brought to trial less than *thirty days* after the occurrence of the crime is *State v. Wilson,* 181 La. 61, 158 So. 621 (1935), and in that case the conviction was reversed. In *State v. Roberson,* 157 La. 974, 103 So. 283 (1925), the interval between crime and trial was *thirty days* in the case of one crime and *six months* in the case of the other. Similarly, in *State v. Satcher,* 124 La. 1015, 50 So. 835 (1905) the trial was held *three months* after the alleged commission of the crime. *State v. Johnson,* 36 La. Ann. 852 (1884), cited by respondent, does not mention the length of this interval.

Thus, even when judged by State standards, respondent's contention that the District Court erred in characterizing the proceedings in the instant case as hasty, is without any merit.

(B)—Failure of Appointed Counsel to Seek Continuance:

i.

On Page 680 of the Transcript of the Record appears the District Court's only reference to defense counsel's failure to seek a continuance. The reference on Page 682, we submit, when read in context and with care as to what is mentioned by the Court in that passage, is more consistent with the Judge's previously expressed view that the proceedings were hasty than it is with respondent's imaginative contention that the District Court held that twelve days between arraignment and trial is *per se* inadequate in a capital case.

We respectfully invite the Court's attention, therefore, to the fact that the District Court's opinion merely points out that counsel failed to seek a continuance despite facts previously shown and fully supported by the record, and that this circumstance tends to show defense counsel's total lack of enthusiasm or diligence. THERE IS NO HOLDING THAT THE REFUSAL OF A CONTINUANCE WOULD HAVE CONSTITUTED REVERSIBLE ERROR UNDER LOUISIANA LAW. Therefore, to answer completely respondent's contention that the District

Court's view on continuances is in conflict with Louisiana law, it need only be shown that there were grounds on which the Trial Judge had power, in his discretion, to grant a continuance:

(1) As respondent has pointed out, the granting of a continuance is "within" the sound discretion of the trial judge". La. R.S. 15:320. Respondent has cited no case, and counsel for relator has found none, where a trial judge's granting of a continuance has been questioned on appeal.

(2) As grounds for requesting a continuance, the record clearly shows that counsel could have alleged in the best of faith:

(a) The mere fact of being rushed to trial fifteen days after the shooting.

(b) The fact that relator's guilt had twice within a week been proclaimed loud and far by two highly prejudicial newspaper articles in the local weekly, a type of publicity far different from the publication in cities of notorious scandal sheets in which no trust is implicitly placed.

(c) The need for seeking expert advice as to the mental condition of the accused (Tr. 346, 153, 157, 192, 193, 207, 208, 265, 273, 566).

(d) To assume for the purposes of argument what respondent contends and we deny (Tr. 122), the absence of an uninterviewed material witness, who was in Arkansas beyond the process of the court.

(e) Public excitement following the shooting of a member of a prominent family, indicated by the gathering at the courthouse on the day of the shooting and increased by the fact that the shooting was apparently one of a rash of shootings in which law enforcement officers had been killed or wounded, an "open season", as people said.

Only if respondent can prove, as he has failed to prove in brief, that the *granting* of a continuance under these circumstances would have been error—only then does his contention on this score have the slightest color of merit.

ii.

Even assuming that the District Court had indicated that the refusal of a continuance under the circumstances would have been error, which we deny can be validly assumed, all Louisiana decisions cited by counsel involved trials beginning more than thirty days after the occurrence of the crime except one, where the conviction was reversed. It is submitted that the interval between crime and arraignment has considerable relevance in determining the propriety.

of the interval between arraignment and trial. For example, a newspaper article that inflames a juror's mind one week is all but forgotten the next. For this reason, the decisions cited by respondent are all distinguishable from the case at bar.

iii.

Under the same assumption and as a third alternative answer to respondent's contention, relator respectfully invites the court's attention to *Avery v. Alabama,* 308 U.S. 444, 446, 84 L. Ed. 377, 379 (1940), wherein the Supreme Court clearly considered the refusal of a continuance as a question of Due Process, determinable according to federal standards, although relief was refused. See also Annot., 84 A.L.R. 544 (1933). In view of this, and for comparison with the alleged but non-existent six day rule in Louisiana, see Federal Rule of Civil Procedure 52 (a) and Article 180, La. Code of Practice, granting the defendant in a *civil action* a minimum of *20* and *10* days respectively to *file an answer.*

iv.

Perhaps more fatal to respondent's contention than any of the above suggestions, however, is the Louisiana Supreme Court's view, expressed in the very decision of that court on which respondent chiefly relies, that

> *"We do not believe that there can be any definite rule set as far as time is concerned, in order*

to be able to say whether or not the accused was allowed adequate time within which to prepare his defense in all cases."

State v. Wilson, 181 La. 61, 158 So. 621, 623 (1935). It is difficult to see how a conflict between the District Court's reference to a continuance and such an inflexible rule could be demonstrated.

II.

FAILURE OF COUNSEL TO SEEK A CHANGE OF VENUE.

A.

On Page 680 of the Transcript of Record appears the District Court's only reference to counsel's failure to seek a change of venue. THERE IS NO HOLDING THAT THE REFUSAL OF A CHANGE WOULD HAVE CONSTITUTED REVERSIBLE ERROR. Counsel's failure is only mentioned as a circumstance showing their lack of diligence. Therefore, to answer fully respondent's contention that the District Court's views on changes of venue are in conflict with state law, it need only be shown that there were grounds on which the District Judge had power, on request, to grant such a change:

(1) Respondent has cited no case where the granting of a change of venue has been questioned on appeal. It is entirely a matter of discretion with the Trial Judge, subject

to review only for abuse. State v. Leming, 217 La. 257, 46 So. 2d. 262 (1950); State v. Washington, 207 La. 849, 22 So. 2d. 193 (1945).

(2) As a basis for requesting a change of venue, counsel appointed for relator could certainly have alleged those facts enumerated on Page 67 hereof, concerning the matter of a continuance.

B.

Moreover, even assuming that the District Court had held that a change of venue *should have been* granted upon request, which we deny, counsel for respondent has cited no decision of the Louisiana courts showing that this would have been inconsistent with state law. Counsel has cited:

Stachlin v. Destrehan, 2 La. Ann. 1019 ( ) was a *civil action* in which the alleged error was the trial judge's refusal of a *continuance* on grounds of public prejudice. The Court stated that appellant should have requested a change of venue.

State v. Abshire, 47 La. Ann. 542 ( ) dealt with the refusal of a *continuance*.

State v. Blount, 124 La. 202, 50 So. 12 ( ) does not show what facts were relied upon in seeking a change of venue.

State v. Roberson, 159 La. 562, 105 So. 621 ( ) involved a motion for a change of venue on the basis of newspaper articles appearing during defendant's first trial, *six months before.*

Shushan v. United States, 117 F. 2d. 110 (1941), a federal mail fraud prosecution, is irrelevant in determining state law.

C.

As a third alternative answer to respondent's contention with regard to defense counsel's failure to request a change of venue, we may assume *arguendo* that the Sheriff, brother of the deceased, was duty bound to take charge of the jury and otherwise officiate at the trial. Certainly a motion for a change of venue to escape this danger-laden situation would have been in order. And is it inconceivable that the Louisiana Supreme Court would not hold the refusal of a change of venue in such a case to be prejudicial error?

III.

FAILURE TO OBJECT TO SHERIFF'S HAVING CHARGE OF THE JURY.

A.

It is admitted that the District Court stated that the Sheriff should have recused himself instead of officiating at the proceedings as described on Page 46 hereof.

But respondent has cited no Louisiana law with which the statement conflicts even remotely.

Article VII, Section 71, La. Const. of 1921, merely provides that the "coroner shall act for and in place of the sheriff, whenever the Sheriff shall be a party interested." Not a single Louisiana decision has been cited interpreting this provision. *State v. Judge,* 11 La. Ann. 80 (1856), decided long before the adoption of this provision, indicates that *a Sheriff who is a party to a civil action should not call jurors to the jury box or attend the jury during the trial.* However, the court in that case decided that the Sheriff's participation with six other officers, in drawing the venire list and summoning veniremen did not invalidate the entire array. Precisely what law can be gleaned from this case to place in sharp contrast to the District Court's statement has not been shown.

Respondent would interpret the above provision as stating that the Sheriff must recuse himself *only* when he is a party to the litigation. As applied to criminal proceedings, this restrictive interpretation leads to either of two absurd conclusions: (1) the Sheriff can never serve in a criminal case because as an officer of the State, he is technically a party; or (2) the Sheriff may serve as usual in a criminal case where his son is the victim of the alleged murder being tried, where his daughter is the victim of a rape, or to reduce it to complete absurdity, where the Sheriff is under prosecution as an accomplice in the commission of a crime, has obtained a severance, and is free on bond when his accomplice is brought to trial. We believe the Louisiana Constitution means no such thing.

There is a judicial pronouncement of the Louisiana Supreme Court which we submit as not only dispelling any suspicion of conflict but as supporting the District Court's statement:

> *"(A) sheriff or deputy sheriff must not let the weight OF HIS OFFICIAL POSITION, WITH ITS INFLUENCE AND POWER, disturb or affect the impartial judgment of a jury in any case. (citing cases)." State v. Murray,* 164 La. 883, 887, 114 So. 721, 723 (1927).

We submit that the duties of the Sheriff in a criminal case are such that he cannot serve when the victim of the murder being tried is as close a relative of his as his own brother without violating this mandate.

B.

Without regard to the Louisiana constitutional provision, however, we submit that the general principles applicable to influencing of jurors required that the Sheriff recuse himself. Could the Sheriff's mere presence in the instant case have been less indicative of his views than words? See *State v. Murray, supra; State v. Dallas,* 35 La. Ann. 899 (1933). In this connection, the attention of the Court is respectfully invited to the views of the United States Supreme Court in *Mattox v. United States,* 146 U.S. 140, 149, 150, 36 L. Ed. 917 (1892) (a federal prosecution):

> *"It is vital in capital cases that the jury should pass upon the case free from external cause tend-*

> *ing to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.* * * * Private communications, possibly prejudicial, between jurors and third persons, or witness, or *the officer in charge,* are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear."

There is no evidence in the record showing the harmlessness of the Sheriff's conduct in the instant case. On the contrary, see Page 46 hereof.

But at any rate, respondent has fallen far short of suggesting a conflict between the District Court's opinion and state law on this point. It is hoped, however, that this discussion will not obscure the core of the question on the merits, namely, the incredible failure of counsel to make the slightest attempt to prevent the conduct of the Sheriff described on Page 46 hereof.

IV.

WITNESSES.

A. Failure to Request Sequestration of Witnesses.

Page 684 of the Transcript of Record is the only portion of the Court's opinion which refers to defense counsel's failure to ask that the witnesses be seques-

tered. When read in context, the District Court's statement that the witnesses were not sequestered is only the mention of a circumstance showing counsel's lack of diligence. THERE IS NO HOLDING BY THE DISTRICT COURT THAT THE TRIAL COURT'S FAILURE OR REFUSAL TO SEQUESTER THE WITNESSES WAS REVERSIBLE ERROR UNDER LOUISIANA LAW. Therefore, to answer respondent's contention that the District Court's views on sequestration of witnesses conflict with state law, it need only be shown that the District Court had power to do so on request of counsel. To show this we need only cite Article 371 of the Louisiana Code of Criminal Procedure, La. R.S. 15:371, and respondent's admission that sequestration is addressed to the discretion of the Trial Judge. See also *State v. Carter*, 206 La. 181, 19 So. 2d. 41 (1941).

R. Failure of Appointed Counsel to Interview Witnesses.

Although we deny that this point has any relevance to a discussion of "conflict" between the District Court's opinion and state law, it should nevertheless be pointed out that respondent's differences with the District Court's statement that only one witness was thoroughly interviewed are based upon respondent's opinion that conversations with witnesses on the morning of trial should be considered "interviews", so long as they take place "before trial started". We respectfully submit that this definition of an "interview" would not find wide acceptance among the

Louisiana Bar. Nevertheless we submit the following excerpts from the Transcript of Record 595; 513:

> The Court:
> In other words, out of thirteen witnesses who were called on behalf of the State at the trial, you are sure that Homer Hodge was interviewed and you think it likely that two others were interviewed; is that correct?
>
> Witness (Appointed Counsel):
> I believe that is correct.
>
> * * * * * * * *
>
> Q. Mr. Berry, I understand you to say in your direct examination that you had spoken to the witnesses Mr. and Mrs. Wilson and then seen Homer Hodge and that you had been shown the statements of the other witnesses; that is correct?
> A. Yes, sir.
> Q. You didn't interview any of the other witnesses before trial?
> A. No, sir.

It is to be presumed that the District Court found that two of these three witnesses had not been thoroughly interviewed from the demeanor of the witnesses, which the Transcript cannot show. Fed. R. Civ. Proc. 52 (a). See also Transcript of Record 222, 647.

V.

FAILURE TO CHALLENGE JUROR.

When read in context, the District Court's reference (Tr. 684) to the acceptance of the juror Lee McMahon, related to the deceased as set forth by the court, is nothing but the pointing to a circumstance indicating defense counsel's lack of diligence. THERE IS NOT THE REMOTEST HOLDING THAT THIS JUROR WAS NOT COMPETENT, *PER SE*, TO SERVE. Therefore, to answer respondent's contention in this regard, it is only necessary to show that the trial judge had power to exclude the juror if the juror had been challenged for cause:

> *State v. Joiner*, 163 La. 609, 112 So. 503 (1927), (exclusion of *personal friend* of deceased upheld)
>
> *State v. Caron*, 118 La. 349, 42 So. 960 (1907) *(third cousin of accused's wife;* exclusion upheld)
>
> *State v. Kellogg*, 104 La. 580, 29 So. 285, 288 (1901) *husband of aunt of prisoner's wife;* exclusion upheld)

VI.

FAILURE TO OBJECT TO "BAD CHARACTER" TESTIMONY.

On Page 685 of the Transcript of Record is the District Court's only reference to the volunteered testimony as to relator's character. All one finds is a

description of the incident and a categorical statement that the judge did not instruct the jury; but the reference is found in the first paragraph of a series preceded by the sentence, "No objections were made to the following trial incidents". Clearly then, the reference is only reference to a circumstance showing counsel's lack of diligence. THERE IS NO HOLDING THAT THE VOLUNTEERED STATEMENT HIGHLY PREJUDICIAL TO RELATOR, NOT FOLLOWED BY PROPER INSTRUCTION TO THE JURY, WOULD HAVE CONSTITUTED REVERSIBLE ERROR ON APPEAL.

But had there been such a holding, respondent's representation of the law is inaccurate. In every case cited by counsel for respondent for the proposition that a volunteered prejudicial statement of a witness cannot constitute reversible error, it clearly appears that the volunteered statement was followed by proper instruction by the judge. *In both cases found by relator where the volunteered remark had not been followed by proper instruction, the conviction was reversed. State v. Cooper,* 223 La. 560, 66 So. 2d. 336 (1953); *State v. Elkins,* 214 La. 501, 38 So. 2d. 150 (1948) (The Court's holding does not clearly appear in the opinion; but Page 12 of the Transcript of Record in that case, Bill of Exception No. 4, reads as follows: "(A certain question put by the State) was objected to by Attorney Fields for the defense as irrelevant, immaterial and too general in its connection and not connected with the specific acts of this defendant. The trial judge over-ruled the objection

and Attorney Fields excepted to the ruling and reserved a bill. *The Sheriff went on to say:* "We had a tip on Roy Elkins selling on that road," and right at that time, Attorney Fields objected to the same . . . The Court overruled the objection . . ." This was the only bill of exception considered by the Supreme Court. A new trial was ordered.)

Therefore respondent's contentions in this regard are entirely without merit.

As to the question raised by respondent concerning the propriety of defense counsel's objecting to this, it should be pointed out that there is evidence in the record that the trial was "held up" when the remark was made (471), which certainly must have accentuated the remark beyond the power of any objection. But we respectfully submit that this question has no relevance to the question of "conflicts" between State law and the District Judge's opinion, which respondent's contentions have failed to show.

VII.

FAILURE TO SEEK NEW TRIAL.

A motion for a new trial could have been based on errors patent on the face of the record, which have been pointed out on Page 49 hereof. La. R.S. 15:510. And despite the absence of the slightest sigh of resistance to the prosecution in the entire record, La. R.S. 15:509 (5) it provides that "A new trial *ought*

*to be granted: * * * Whenever, though as a matter of legal right the accused may not be entitled to a new trial, yet the judge is of the opinion that the ends of justice would be served by the granting of a new trial."* Thus the contention of respondent that the Detrict Court's suggestion of lassitude on the part of counsel for failure to file a motion for a new trial was "largely cumulative" is without merit.

VIII.

FAILURE TO APPEAL.

Since counsel appointed for relator could have filed a motion for a new trial within the framework of Louisiana procedure, they could also have appealed, on the basis of the same errors patent on the face of the record. La. R.S. 15:559.

IX.

It is respectfully submitted to this court that it is erroneous for respondent to contend that defense counsel's failure to offer any evidence on relator's behalf, their failure to ask for special charges, their failure to make any objections, reserve any bills of exception, file any defensive motions before, during, or after trial, and their failure to appeal—that these serious omissions are "largely cumulative, in that they depend for justifiable complaint upon the validity or legality of the points heretofore discussed." (Application herein, Page 54). Counsel sincerely believes

that the "points heretofore discussed" by respondent have been shown to be utterly without merit, being based either upon obvious misconstructions of the District Court's opinion, incorrect appreciation of State law, or—in many instances—both.

X.

Wherefore, relator prays that respondent's application for a certificate of probable cause be denied.

(Signed) EUGENE STANLEY,
(Eugene Stanley),
J. CHARLES COLLINS, JR.,

By (Signed) EUGENE STANLEY,
Attorney.
J. CHARLES COLLINS, JR.,
(J. Charles Collins, Jr.),
LEON A. PICOU,

By (Signed) EUGENE STANLEY,
Attorney.
LEON A. PICOU,
Attorneys for Joseph Sheffield, Relator (Appellee).

I hereby certify a copy of this complete brief was served on Hon. Hugh M. Wilkinson, Sr., by leaving same at this office this day, May 23, 1955.

(Signed) EUGENE STANLEY,
Attorney.

APPENDIX "A".

The following table provides an avenue into the record from any of the District Court's findings of fact. The text of the District Court's opinion begins on Page 673 of the Transcript of Record. The numerals below show the page and line numbers of the Court's findings and the corresponding pages in the Transcript where the basis of such findings appear. In parenthesis are the source of the evidence and, where necessary, an indication of its nature. Findings not expressly mentioned by the District Judge but closely related are indicated by an asterisk (*). The following witnesses were examined:

Name—Testimony begins Page—Role

Harry N. Anders
311 District Attorney, Fifth Judicial District, State of Louisiana.

Travis Bass
35 Deputy Sheriff who volunteered bad character testimony.

B. I. Berry
462 Counsel appointed for Sheffield.

Harry V. Booth
553 Member of Committee appointed by Board of Governors of Louisiana State Bar Association.

Solon L. Chambly
190 Spectator at Relator's trial and observor of mental condition.

David L. Chase
143 Special Deputy tending Jury overnight.

Mrs. Faye Elkin
661 Secretary to District Attorney.

Mrs. Yvonne Brett Heron
280 Newswoman covering trial.

Mrs. Addie B. Hutson
171 Witness to events leading up to and immediately following shooting.

Dr. H. E. Jones
47 Coroner.

Robert Lee Johns, Sr.
157 Spectator at trial.

S. E. Lee
585 Counsel appointed for Sheffield.

Robert W. McDonald
264 Spectator and erstwhile employer of Sheffield.

Rudolph McIntyre
414 Counsel for Sheffield who entered case at request of other four.

Emmet B. Moore
516 Counsel appointed for Sheffield.

Mrs. Flora Pilgrim
104 Eye-witness to shooting.

Henry C. Sevier
649 Member of Committee appointed by the Board of Governors of Bar Association.

Hiram B. Waller
56 Sheriff, brother of deceased.

Mrs. Emma Laura Sheffield Wilson
213 Mother of Sheffield and witness to shooting (?)

District Court's Opinion		Transcript of Record
Page:	Line	Page:
673	8	494 (Court)
	12	23 (Application for Habeas Corpus)
		19 (Certificate of Trial Judge)

District Court's Opinion		Transcript of Record	
Page:	Line	Page:	
	16	20	(Certificate of Trial Judge)
	19	10	(Application for Habeas Corpus)
		26	(Certificate of Trial Judge)
		215	(Relator's mother)
		214	(Relator's mother)
		228	(Relator's mother)
		362	(Anders)
		387	(Anders)
	21	360	(Anders)
		491	(Berry)
		520	(Moore)
	22	360	(Anders)
674	14	661	(Mrs. Elkin)
		314	
		379	
		430	
		431	
		446	
		551	
	20 (Painstaking-ness of District Court)	599	257
		614	307
		178	314
		198	315
		218	445
		244	506
		246	534
		255	
675	10	282	(Mrs. Herron)
	15	294	(Mrs. Herron)
679	4	631	(Lee)
	9	3	(Application for Writ)
		20	(Certificate of Trial Judge)
		360	(Anders)

District Court's Opinion Page:	Line	Transcript of Record Page:
	15	446 (McIntyre—"fellow sufferers")
		422 (McIntyre—"unanimous")
		417 (McIntyre)
		419 (McIntyre)
		423 (McIntyre)
		435 (McIntyre)
	22	394
		21 (Trial Judge)
		529 (Moore)
	22	535 (Moore)
		543 (Moore)
		555 (Booth)
680	3	353 (Anders)
		354 (Anders)
	6	555 (Booth)
	11	543 (Moore)
		394 (Moore)
		21 (Moore)
		529 (Moore)
		535
681	3	647 (Lee)
		338 (Anders)
		378 (Anders)
		402 (Anders)
		434 (McIntyre)
		552 (Moore)
		608 (Lee)
	14	647 (Lee)
		613 (Lee)
		490 (Berry)
		368 (Anders)
		288 (Mrs. Herron)

District Court's Opinion Page:	Line	Transcript of Record Page:	
		289	(Mrs. Herron)
		290	(Mrs. Herron)
		580	(Moore)
		584	(Moore)
4	(Background)	215	
		214	
		228	
		362	
		387	
5	(Insanity?)	192	273
		193	566
		207	153
		208	157
		265	346
11		595	(Lee—"thirteen")
		595	(only Hodge thoroughly)
		467	(Berry)
		470	(Berry)
		546	(Moore—Eye-witness not interviewed)
		119	(Mrs. Pilgrim—not interviewed)
		466	
		221	
		486	(Berry)
		513	(Berry)
		521	(Berry)
		171	(Mrs. Hutson saw most of it)
		178	(Mrs. Hutson not interviewed)
		181	(Mrs. Hutson not interviewed)
682	18	110	(Mrs. Pilgrim)

District Court's Opinion Page:	Line	Transcript of Record Page:	
	22	113	(Mrs. Pilgrim)
		116	(Mrs. Pilgrim)
		121	(Mrs. Pilgrim)
		124	(Mrs. Pilgrim)
		132	(Mrs. Pilgrim)
		667	(Mrs. Elkin)
		668	(Mrs. Elkin)
		669	(Mrs. Elkin)
	25	506	(Berry)
		523	(Moore)
		592	(Lee)
683	5	540	(Moore)
	6	22	(Trial Judge—crowded courtroom)
		181	(Mrs. Hutson)
		266	(McDonald)
		267	(McDonald)
	8	22	(Certificate of Trial Judge)
		73	(Waller—sat in witness chair)
		58	(Waller—drew names)
		85	(Waller—drew names)
		103	(Waller—drew names)
		366	
		397	(Anders)
		476	(Berry)
		602	(Lee)
		533	(Moore—no motion to recuse)
		602	(Lee—no motion to recuse)
		434	(McIntyre—no motion to recuse)
683	12	89	(Waller—notified talesmen)
		103	(Waller—notified talesmen)

District Court's Opinion Page:	Line	Transcript of Record Page:	
		*97	(Deputies were hand-picked)
		*99	(Deputies were hand-picked)
		*147	(Chase) "
		*148	(Chase " Johns
		*160	(Sheriff—D. A Signals?)
		*199	(Chambley—D. A. Signals?)
		*100	(Waller—favor to juror)
		*67	(Waller—knew them all)
684	3	61	(Waller)
	4	603	(Lee)
		*63	(one-mile drive with six jurors)
		*77	(Waller testified)
	7	553	(Moore)
		602	(Lee)
		434	(McIntyre)
	9	65	(Waller)
		431	(McIntyre)
		487	(Berry)
		604	(Lee)
		542	(Moore)
	12	119	(Mrs. Pilgrim)
		395	(Anders)
		396	(Anders)
		426	(McIntyre)
		596	(Lee)
		470	(Berry)
		536	(Moore)
	16	112	(Mrs. Pilgrim)
		115	(Mrs. Pilgrim)
		372	(Anders)
	18	413	(Anders)
		429	(McIntyre)

District Court's Opinion Page:	Line	Transcript of Record Page:
	19	379 (Anders)
		530 (Moore)
	21	475 (Berry)
		493 (Berry)
		541 (Moore)
		648 (Lee)
		580 (Moore)
		584 (Moore)
	24	278 (Mrs. Herron)
		347 (McIntyre)
685	1	338 (Anders)
		378 (Anders)
		402 (Anders)
		434 (McIntyre)
		552 (Moore)
		608 (Lee)
	7	37 (Bass)
		39 (Bass)
		40 (Bass)
		601 (Lee)
	3	602 (Lee)
	12	646 (Lee)
	15	7 (Application for Writ)
		25 (Trial Judge)
		338 (Anders)
		378 (Anders)
		402 (Anders)
		434 (McIntyre)
		552 (Moore)
		608 (Lee)
	16 : See I La. Bar Journal No. 3—pp. 8-11 (April, 1954)	
	22	8 (Application for Writ)
		25 (Certificate of Trial Judge)

APPENDIX "B".

THE DISTRICT COURT HAD JURISDICTION TO GRANT PETITIONER THE RELIEF PRAYED FOR: (See Transcript of Record 494).

Jurisdiction to issue the writ of habeas corpus is conferred upon the district courts of the United States by the provisions of 28 U.S.C.A. 2241-2255, inclusive. Section 2241 makes this jurisdiction specifically applicable to cases where the applicant "is in custody in violation of the Constitution or laws or treaties of the United States." Section 2254 provides as follows:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In addition to the requirements imposed by the section just quoted, the United States Supreme Court has recently declared in *Darr v. Burford*, 339 U.S. 200 (1950), that as a further prerequisite to bringing

habeas corpus in a federal district court the applicant, after having exhausted state remedies, must apply for certiorari to the United States Supreme Court.

The question to be resolved here is whether relator has exhausted the remedies available to him in the courts of Louisiana. This issue presents a superficial difficulty because of relator's failure to invoke such theoretically available remedies as (a) appeal from his conviction, (b) the writ of habeas corpus provided for by Louisiana law (La. R.S. 1950, 15:113-141, inclusive), (c) the common law writ of error coram nobis theoretically applicable under the language of La. R.S. 15:0.2 providing that "In matters of criminal procedure where there is no express law the common law of procedure shall prevail," or (d) any other available procedure. This apparent difficulty is only superficial, however, as will be hereinafter demonstrated.

Preliminarily, it should be made clear that relator's failure to appeal from his conviction is no bar to habeas corpus since he asserts that his constitutional rights were violated by the denial of counsel at his trial. The case of *Williams v. Kaiser*, 323 U.S. 471 (1945), considered this precise question and concluded that "under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect." (323 U.S. at 477. See also Annotation 94 L.E. 785, 790).

It is the contention of counsel for relator that he has met all of the requirements imposed by the rule requiring the exhaustion of remedies available in the courts of the State for the following reasons:

1. Relator has exhausted one state remedy available to him through his efforts to seek a new trial which were unsuccessfully pursued to the point of the denial of certiorari by the United States Supreme Court.

2. The federal statute conferring and regulating jurisdiction in habeas corpus does not compel a state prisoner to make repetitious applications to a state court for relief based upon the same evidence previously offered and rejected.

3. In the alternative and assuming relator has failed to exhaust available state remedies, the "special circumstances" of this case warrant the granting of relief requested under the authoritative decisions of the United States Supreme Court.

1. Relator has Exhausted One State Remedy Available to Him Through His Efforts to Seek a New Trial Which Were Unsuccessfully pursued to the Point of the Denial of Certiorari by the United States Supreme Court.

As set forth in greater detail in the application for writ previously filed herein, relator, upon retaining counsel of his own choice subsequent to his conviction by the trial court in Louisiana, sought to file a motion

for a new trial which was returned by the clerk pursuant to instructions by the trial judge "for the reason that same was filed too late." Thereupon an application for writs of certiorari, mandamus, prohibition, and all general and equitable relief was filed by counsel on behalf of relator with the Supreme Court of Louisiana. That application made detailed allegations of facts in support of the applicant's contention that he had been denied due process of law by the denial of counsel and the manner in which proceedings were conducted at the trial of his case. (See particularly paragraphs 7 through 20 of the application filed with the Supreme Court of Louisiana). In denying the application for relief the Supreme Court of Louisiana placed its decision on the same ground as that assigned by the trial court, saying that "The imposition of the sentence was a final disposition of the case (R.S. 15:541) and the only words which the trial judge could render were those pertaining to ministerial matters or those not in controversy on appeal, in the event an appeal had been taken. R.S. 15:545. He was powerless to consider a motion for a new trial, which was presented to him after the imposition of sentence, in view of the positive provisions of Article 505 of the Code of Criminal Procedure (R.S. 15:505) declaring that a motion for a new trial 'must be filed and disposed of before sentence' ". In its per curiam order dismissing the case the Supreme Court of Louisiana made no reference to the constitutional issue raised by the application. The Court's order was concerned solely with the scope of the power in

the district court and made no appraisal of the power of the Supreme Court itself in such cases. And this is not a case in which there is distinction without a difference.

Counsel for relator contend that, first, the jurisprudence of the Supreme Court of Louisiana demonstrates that the Supreme Court does have authority in the exercise of its supervisory jurisdiction over district courts to correct void orders and to invalidate proceedings which are void or effect the impairment of constitutional liberties, and second, by failing to grant relief in this case the Supreme Court of Louisiana must be taken to have denied it. Illustrative of the point in the case of *State v. Cooper*, 185 La. 1032, 171 So. 435 (1936) in which the Supreme Court of Louisiana "avoided and set aside" the sentence of a defendant charged with assault despite the fact that no motion for a new trial had been filed and that five bills of exceptions tendered by the defendant were found to be without merit, relying solely upon the ground (unassigned by counsel) that the trial court had imposed sentence in excess of the limits prescribed by the statute involved. In the course of its opinion the Supreme Court of Louisiana said, "We have, in the abundance of precaution, considered these bills, although, under the provisions of Article 559 of the Code of Criminal Procedure, and the case of *State v. Stephens*, 183 La. 431, 164 So. 162, we might have dismissed them." The provisions of Article 559 of the Code of Criminal Procedure declare that "no new trial can be granted upon appeal

unless a motion for same has been made and refused in the lower court . . .", a provision which is in all respects comparable to Article 505 cited and relied upon by the Supreme Court of Louisiana in the instant case, which reads, "every defendant has the right to move for a new trial at any time after verdict, but such motion must be filed and disposed of before sentence."

It is quite clear, therefore, in the light of the jurisprudence just referred to, that the Supreme Court of Louisiana has the power to grant the relief requested but simply refused to exert it to confer the relief requested by the applicant in his application for supervisory writs. Article 7, Sec. 10, La. Const. of 1921, provides, "The Supreme Court shall have control of, and general supervision over all inferior courts . . ." Art. 7, Sec. 2 of La. Const. of 1921, provides: "The Supreme Court . . . and each district judge throughout the state . . . may . . . issue in aid of their respective jurisdictions . . . *all* other needful writs, orders, and process." (Italics supplied.) In *Thomas v. Doughty*, 163 La. 213, 217, 111 So. 681, 682, (1927), the Supreme Court of Louisiana declared, "*This Court, in the exercise of its general supervision and control over inferior courts, is not tied down by forms of procedure, and will look to the substance of the right sought to be vindicated and the need for speedy relief, rather than to the form in which such relief is sought, State ex rel Saizan v. Judge*, 48 La. Ann. 1501, 1514, 21 So. 2d. 94, 99." (Italics supplied.) In *State v. Doucet*, 199 La. 276, 282, 5 So. 2d. 894, 896 (1942) the Supreme Court of Louisiana again de-

clared: "It is clear that this Court has *plenary power* under Sections 2 and 10 of Article VII of the Constitution of 1921, *granting it supervisory jurisdiction over all inferior courts and that these constitutional provisions must prevail over any provisions in a legislative act that conflict therewith.*" In *State v. Bowie*, 221 La. 41, 49, 58 So. 2d. 415, 420 (1952): "The policy of the court, of course, is to exercise its supervisory jurisdiction in its discretion when it considers that an error has been committed which does a *substantial injustice* to a party to a cause." (Italics supplied.) As the Supreme Court of Louisiana stated in *State v. Doucet, supra*, its supervisory power is "plenary"; it is subject to "no limitation whatever." *State v. Richard*, 149 La. 568, 575, 89 So. 697, 699 (1921); see also *Ball v. Campbell*, 222 La. 357, 362, 62 So. 2d. 511, 513 (1952); *State v. General Manager of Louisiana State Penitentiary*, 188 La. 694, 703, 177 So. 804, 807 (1937) wherein the Court said: "*There is no doubt now about the supervisory jurisdiction of the Supreme Court over the decisions of the other courts of this state, with regard to the merits of the case, as well as the legality or regularity of the proceedings, where there is no right of appeal.*" (Italics supplied.) Such examples would be multiplied.

As previously indicated, the United States Supreme Court has held in *Williams v. Kaiser*, 323 U.S. 471 (1945), that a failure to appeal is of no consequence where the applicant for habeas corpus alleges the denial of due process via the refusal to appoint counsel. By the same token, it should certainly follow that the failure to file a motion for a new trial should

be equally excusable when attributed to the same cause. A conviction resulting from a trial fraught with constitutional infirmity would also appeal to be equally void as one which results in an erroneous imposition of a greater sentence than that imposed by the trial court.

Accordingly, it is submitted that relator has exhausted one remedy which, under the jurisprudence of the State of Louisiana, was available to him for the correction of his constitutional deprivation and he was denied the relief requested by the State's highest court of last resort. Following that denial, as the record plainly shows, his petition for a writ of certiorari to the United States Supreme Court seeking to review the action of the Louisiana court was denied on October 14, 1954.

2. The Federal Statute Conferring and Regulating Jurisdiction in Habeas Corpus does not Compel a State Prisoner to Make Repetitious Applications to a State Court for Relief Based upon the same Evidence Previously Offered and Rejected.

In its most recent consideration of the scope and meaning of the second paragraph of Section 2254 of Title 28, U.S.C.A., the United States Supreme Court declared that the statute was not intended to require repetitious applications to state courts for collateral relief based upon the same evidence and issues previously decided. *Brown v. Allen*, 344 U.S. 443. In its discussion of this issue the Court said:

> "We conclude that all required procedure for state review of the convictions had been exhaust-

ed by petitioners in each case before they sought the writs of habeas corpus in the federal courts. In each case petitions for certiorari to this Court for direct review of the state judgments rendered by the highest court of the state in the face of the same federal issues now presented by habeas corpus had been denied.

"It is not necessary in such circumstances for the prisoner to ask the State for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to this Court."[1]

The decision in *Brown v. Allen* reaffirms the principle which has been established prior to the 1948 amendment of the federal statute in the case of *Wade v. Mayo,* 334 U.S. 672 (1948) (overruled on another point in *Darr v. Burford,* 339 U.S. 200 (1950,)) where the court said in part, "In our view it was proper for the District Court to entertain Wade's petition for a writ of habeas corpus and to proceed to a determination of the merits of Wade's constitutional claim. The crucial point is that Wade had exhausted one of the two alternative routes open in the Florida courts for securing an answer to his constitutional objection . . . the exhaustion of but one of several available alternatives is all that is necessary."

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[1] We reach this conclusion after consideration of the second paragraph of 28 U.S.C. Sec. 2254, 28 U.S.C.A. Sec. 2254.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." (Footnote by the Court.)

It follows, therefore, that relator in this case having exhausted one available remedy in his effort to cure the constitutional infirmity of his trial by his application to the Supreme Court of Louisiana for writs of certiorari, mandamus, prohibition, and general and equitable relief (as argued in Part I) was excused from making repetitious applications to Louisiana courts for alternative remedies. We may, therefore, assume the availability of such remedies as habeas corpus or the writ or error coram nobis, or others (despite the lack of jurisprudence indicative thereof) and conclude nevertheless that relator need not pursue these remedies in order to qualify for relief under the federal statute.

3. In the Alternative and Assuming Relator had Failed to Exhaust Available State Remedies, the "Special Circumstances" of this Case Warranted the Granting of Relief Requested under the Authoritative Decisions of the United States Supreme Court.

Despite the apparent mandatory character of the language contained in 28 U.S.C.A. 2254, the decisions of the United States Supreme Court have consistently recognized that "special circumstances" justify the exercise of habeas corpus jurisdiction by federal courts despite an applicant's failure to exhaust available state remedies. Considerations of prompt and orderly procedure and the existence of extraordinary circumstances have frequently been cited as the occasions for invoking this exception. The leading case of *Darr v. Burford*, 339 U.S. 200 (1950), recognized

this exception in favor of special circumstances as continuing and surviving the 1948 amendment of the statute. (See 339 U.S. at 210.) The principle has received even more recent application in the case of *Frisbie v. Collins*, 342 U.S. 519 (1952).

At least two grounds may be urged as a basis for classifying the instant case as one of "special circumstances". The first of these special circumstances is to be found in the order of the United States Supreme Court of October 14, 1954, declaring that "the petition for a writ of certiorari is denied without prejudice to petitioner to apply to the appropriate United States District Court for a writ of habeas corpus." In ordinary circumstances it is well settled that Supreme Court orders denying certiorari are of not substantive significance. Somewhat different significance is to be attributed to denials of certiorari where reasons are stated as is more fully expounded in the case of *Brown v. Allen*, 334, U.S. 443, at page 447. In the instant case the implied invitation to apply for habeas corpus to the federal court, though certainly not dispositive of the issues of jurisdiction, nevertheless suggests that the Supreme Court itself assumed that a reasonable basis exists for invoking that jurisdiction. It had examined the record, it was familiar with the facts, it is informed as no other court can be of the views which it itself holds on this question of jurisdiction. Accordingly, some weight must at least be accorded to the circumstance that the Supreme Court itself has impliedly invited the filing of this application.

A second "special circumstance" which sets this case apart, is the report of the special committee of the Louisiana State Bar Association which investigated the conviction of relator. The findings of that committee led the Association to conclude that "Sheffield had not received a fair and constitutional trial". 1 *Louisiana Bar Journal* 8, 9, (1954). The primary difficulty over questions of jurisdiction of federal courts to entertain applications for habeas corpus by State prisoners arises out of concern for State sovereignty in a federal system. Proper regard for the right of the states to police local law enforcement makes the federal judiciary reluctant to intervene as the critic or reviewer of state judicial process. Much of this concern necessarily vanishes when the organized bar of a state has expressed its condemnation of a particular proceeding. (See Transcript of Record 494, 499.)

In conclusion, therefore, and assuming that relator has failed to make a case for jurisdiction under points 1 and 2 to sustain the jurisdiction of the court under the rule requiring the exhaustion of state remedies, it is submitted that this case, because of its "special circumstances" presented a situation in which federal relief should have been granted without further resort to State court procedures.

THE RELIEF GRANTED.

The application for habeas corpus filed by the applicant demanded his discharge from the custody of the Sheriff of Franklin Parish on the theory that the proceedings which gave rise thereto constituted a denial of Due Process of Law. This did not, however, confront the court with the dilemma of having to choose between an absolute discharge and the denial of all relief. Section 2243 of Title 28 U.S.C.A. authorizes the Court in habeas corpus proceedings to "dispose of the matter as law and justice require". The Fourteenth Amendment forbids Louisiana from keeping the applicant in jail pursuant to a trial and conviction which denied him due process of law. On the other hand, justice does not require Louisiana to discharge the applicant if it affords him a new trial at which he is accorded his constitutional liberties. Hence, it was within the power of the District Court to enter an order which was appropriate to allow Louisiana a reasonable time in which to afford the applicant a new trial under circumstances affording him due process of law. *Dowd v. United States*, 340 U.S. 206, 209 (1951).

OPINION DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE.

Filed May 31, 1955.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15,575.

HIRAM B. WALLER, SHERIFF OF THE PARISH OF FRANKLIN, STATE OF LOUISIANA,
Appellant,

versus

UNITED STATES OF AMERICA, EX REL JOSEPH SHEFFIELD,
Appellee.

Application to United States Court of Appeals for the Fifth Circuit, and the Judges thereof, by Defendant-Appellant, for Certificate of Probable Cause.

(May 31, 1955.)

Before HUTCHESON, Chief Judge, RIVES and TUTTLE, Circuit Judges.

PER CURIAM: The application of Hiram B. Waller, Sheriff of the Parish of Franklin, State of Lou-

isiana, appellant in the above styled cause, for a certificate of probable cause on an appeal from the judgment of the District Court for the Western District of Louisiana, Monroe Division, entered on January 10, 1955, and the briefs in support of, and in opposition to, said application, having been carefully considered by the Court, and by the Judges thereof, and neither the Court, nor any of the Judges thereof being of the opinion that a certificate of probable cause should issue, said application is therefore

DENIED.

JUDGMENT.

Extract from the Minutes of May 31st, 1955.

No. 15,575.

HIRAM B. WALLER, SHERIFF OF THE PARISH OF FRANKLIN, LOUISIANA,

versus

UNITED STATES OF AMERICA, EX REL, JOSEPH SHEFFIELD.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and on respond-

ent's application for a certificate of probable cause, and was argued by counsel on briefs, and the application was denied;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the appeal in this cause be, and the same is hereby, dismissed for want of jurisdiction.

PETITION FOR REHEARING OF CERTIFICATE OF PROBABLE CAUSE.

Filed June 21, 1955.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15,575.

HIRAM B. WALLER, Sheriff of the PARISH OF FRANKLIN, STATE OF LOUISIANA,
Appellant,

versus

UNITED STATES OF AMERICA, ex rel JOSEPH SHEFFIELD,
Appellee.

PETITION OF APPELLANT, HIRAM B. WALLER, Sheriff of the PARISH of FRANKLIN, STATE OF LOUISIANA, for a REHEARING on the question of the granting of a CERTIFICATE OF PROBABLE CAUSE.

Hiram B. Waller, Sheriff of the Parish of Franklin, State of Louisiana, appellant in the above-entitled

cause, respectfully petitions this Honorable Court, within the delay provided for so doing, for a rehearing of his application previously made herein for a certificate of probable cause for the allowance of this appeal, which application was denied by per curiam handed down on May 31st, 1955.

The petitioner respectfully reserves his argued position in the brief he submitted on each of the points relied on as establishing his right to a certificate of probable cause for this appeal.

The circumstance that this Honorable Court, in its per curiam of May 31st, 1955, has assigned no reasons whatever for its action other than the statement that neither the Court nor any of the Judges thereof were "of the opinion that a certificate of probable cause should issue", leaves appellant in the difficult position of not having the correctness or incorrectness of any specific issues to discuss in this petition.

This Honorable Court's attention, however, is respectfully called to the fact that in briefs of approximately 50 typewritten pages in length on each side of the controversy, the parties have found serious reasons, each from their own viewpoint, to debate the asserted inconsistencies between the legal findings of the District Judge and the applicable procedural law of Louisiana; and we respectfully repeat, and undertake to again emphasize, our argument that, as a matter of public concern, there is not only probable cause but ample justification for a review of attempted interpretations of State law by a Federal District Judge which so patently run counter to the

terms of State statutes and the holdings of the State court of last resort.

It becomes a very serious matter to the public interest that control and custody of a convicted murderer, who has callously taken the life of a peace officer, and who has received in his trial all the due process, immunities, protections, rights and representations that the statutes and Supreme Court decisions of Louisiana require, can be taken out of the hands of the duly constituted State authorities by the decree of a District Federal Judge who has virtually re-written the established rules of such a criminal trial according to his own viewpoint of what those rules should be rather than what the Legislature and Supreme Court of Louisiana have declared them to be.

The situation becomes even more complicated when neither the appellate court, nor any member thereof, can be persuaded by lengthy and carefully prepared briefs to recognize the fact that serious and substantial questions of what are correct procedures under State law do exist in the controversy, and that the lower Court's holdings on these legal, rather than factual questions, are eminently deserving of review and correction, if after hearing correction is found to be necessary. At least, then the State of Louisiana, the real party at interest, whose officer the appellant is, will have had its day in court to review the mistakes which, it is conscientiously believed, the District Federal Judge has made.

Decision of "an important state or territorial question in a way in conflict with applicable state or

territorial law" is recognized as one of the very important reasons for federal judicial review (Supreme Court Rule 19, paragraph b); and it is respectfully urged again that appellant has made a substantial showing in his brief, filed on the question of probable cause, that his Honor, Judge Ben Dawkins, Jr., has decided not one, but several Louisiana questions in a way in conflict with Louisiana law, in order to reach his decision adverse to appellant.

Wherefore, and for the foregoing reasons, appellant respectfully prays that this petition for a rehearing, upon the question of the granting of a certificate of probable cause, should be granted; and for any and all other orders of court necessary in the premises.

FRED S. LeBLANC,
Attorney General of Louisiana.

M. E. CULLIGAN,
Assistant Attorney General.

HUGH M. WILKINSON,
Special Assistant Attorney General.

HARRY N. ANDERS,
District Attorney, Fifth District of Louisiana.

By (Signed) HUGH M. WILKINSON,
(Hugh M. Wilkinson),
Special Assistant Attorney General.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Before me personally came and appeared Hugh M. Wilkinson, duly appointed Special Assistant Attorney General of the State of Louisiana in this cause, and specially directed and authorized to file a petition for rehearing in the instant matter, who, being by me duly sworn, certifies that this petition is filed in good faith and not for purpose of delay and that in his judgment it is well founded in law.

(Signed) HUGH M. WILKINSON,
(Hugh M. Wilkinson).

Sworn to and subscribed before me this 21st day of June, 1955.

(Signed) HUGH M. WILKINSON, JR.,
(Seal) Notary Public.

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the above and foregoing petition for rehearing has this day been served on Mr. Eugene Stanley, chief of counsel for relator, by mailing same to him at his law office in the Whitney Building, New Orleans, La.

New Orleans, La., June 21st, 1955.

(Signed) HUGH M. WILKINSON,
Special Assistant Attorney General.

ORDER DENYING REHEARING.

Extract from the Minutes of July 18th, 1955.

No. 15,575.

HIRAM B. WALLER, SHERIFF OF THE PARISH OF FRANKLIN, STATE OF LOUISIANA,

versus

UNITED STATES OF AMERICA, EX REL JOSEPH SHEFFIELD.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

MOTION (LETTER) OF APPELLANT TO CLARIFY JUDGMENT.

Filed July 20, 1955.

July 19th, 1955

Mr. John A. Feehan, Jr., Clerk,
U.S.Circuit Court of Appeals, Fifth Circuit,
Postoffice Building,
New Orleans, Louisiana.

In re: *No. 15,575, Waller, etc. vs. U.S., ex rel Sheffield.*

Dear Mr. Feehan:

I have for acknowledgment yours of yesterday (July 18th) advising me that, as of that day, the

Court has entered an order denying the petition for rehearing which appellant filed on June 21st, 1955, based on the per curiam order of May 31st, 1955, denying appellant's application for a certificate of probable cause for the appeal.

Because of the fact that the Attorney General has directed me to seek certiorari in the Supreme Court of the United States, I am rather worried over a procedural question.

The Court's per curiam of May 31st, 1955, is restricted in its terms to a denial of appellant's application for a certificate of probable cause. Nothing is mentioned concerning a disposition of the appeal presently lodged under the above docket number and title. As far as anything in the record shows it is still open on the docket of the Court. Conceding the apparent legal soundness of the doctrine that the Court has no jurisdiction without a certificate of probable cause from either the district or a circuit judge, nevertheless in five recent and comparable cases in this circuit there has been express dismissal of the appeals in language as follows (italics ours):—

> "The record standing thus, and the judges of this court, after an examination of the record, being of the opinion that the district court rightly denied the petition and that upon the authority of (citing authorities) there exists no probable cause for an appeal, and declining to issue such certificate, *the appeal is dismissed* for want of jurisdiction."
>
> —*Harris v. Ellis,* 194 F2d, at page 604, decided Feb. 15th, 1952, before Borah, Russell and Rives, Circuit Judges.

"Upon our examination of the record to determine whether such a certificate should be issued and the appeal allowed we find that not only is it not made to appear that there has been an exhaustion of State remedies, but also that the contention made is without merit. We therefore decline to issue a certificate of probable cause, and accordingly *dismiss the appeal.*"

—*Seymour v. Ellis*, 196 F2d, at page 495, decided April 22nd, 1952, before Holmes, Russell and Rives, Circuit Judges.

"This is an appeal from an order denying a petition for habeas corpus seeking relief from custody under state process. The district judge having declined to issue a certificate of probable cause, the judges of this court have carefully examined the record to determine whether the appeal has enough merit to justfiy the issuance by them of such a certificate. Finding that it has not, they decline to issue the certificate, and, *on the motion of appellee, the appeal is dismissed* for want of jurisdiction. Cf. Harris v. Ellis, 5 Cir. 194 F.2d 604, and Seymour v. Ellis, 5 Cir., 196 F.2d 495."

—*Davis v. Ellis*, 199 F2d 754, decided November 18th, 1952, before Hutcheson, Borah and Rives, Circuit Judges.

"We take this opportunity, however of saying that we find in the record no adequate basis for the issuance of a certificate of probable cause

and no reason to believe that the district court lawfully could have done otherwise than deny the appellant's petition. The appellant made no substantial showing of the denial of any federal right and upon the authority of (citing authorities) *the appeal is dismissed* for want of jurisdiction."

—*Harris v. Ellis,* 204 F2d, at page 686, decided May 29th, 1953, before Holmes, Borah and Rives, Circuit Judges.

"Our examination of the record to determine whether such a certificate should be issued and the appeal allowed discloses that the contentions made are without merit. We, therefore, decline to issue a certificate of probable cause, *and accordingly dismiss the appeal.*"

—*Oliver v. Ellis,* 210 F2d, at page 824, decided March 5th, 1954, before Hutcheson, Holmes and Borah, Circuit Judges.

Under the restricted language of the per curiam of May 31st, 1955, in the case at bar, it appearing that neither on its own motion nor on a motion by appellee has this Court dismissed our appeal, and has thereby not followed its own precedents set in the five cases quoted from, appellant may be in rather an ambiguous position regarding an application for certiorari with regard to the running of delays.

This is particularly true also as to the effect of the Court's ruling upon that clause of Judge Dawk-

ins' writ which decrees that the convicted murderer Sheffield shall be released unless the State "grants him another trial—a fair trial—within six months *from the finally effective date* of the decree to be entered herein" (italics ours). What will be the finally effective date of Judge Dawkins' decree, now appealed from? This seems an uncertain matter unless and until the appeal (which suspended Judge Dawkins' decree) is itself dismissed from the Circuit Court docket.

So far we have applied for a rehearing only on the point of the denial of the certificate of probable cause. This has now been refused. If and when an order is entered—as in the five cases quoted from—dismissing our appeal, it appears that we should have, and should exhaust, our right to seek a rehearing on that action of the Court, or else our application to the Supreme Court for certiorari might be treated as premature or not based on exhaustion of our legal resources below. Also such an order will delimit the running of the six months for another State court trial, as provided in the District Court's decree, if and when such a second trial should prove necessary.

The reason the undersigned spoke to you about this matter today is because if there is any intention to issue a mandate to the District Court without prior dismissal of the appeal, we would like some notice of it in order to apply for a stay of the mandate long enough to get our application for certiorari filed at Washington.

I will appreciate your seeking advice upon the matter and letting me know the result.

Sincerely yours,

(Signed) HUGH M. WILKINSON,
(Hugh M. Wilkinson).

HMW:csh

MOTION OF APPELLANT FOR STAY OF MANDATE.

Filed July 28, 1955.

**UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT.**

No. 15,575.

HIRAM B. WALLER, Sheriff of the PARISH OF FRANKLIN, STATE OF LOUISIANA,
Appellant,

versus

UNITED STATES OF AMERICA, ex rel JOSEPH SHEFFIELD,
Appellee.

MOTION FOR STAY OF MANDATE.

The appellant above named respectfully moves this Honorable Court to stay the mandate in the above-entitled action, and respectfully suggests:—

1.—This is a habeas corpus matter in which the District Court has granted the writ in behalf of a convicted murderer held under State process and has refused to grant a certificate of probable cause (U.S.C.A., Title 28, Sec. 2253) for the appeal of the State officer responsible for the detention of the relator.

2.—That on May 31st, 1955, this Honorable Court handed down a per curiam also refusing to grant such a certificate of probable cause, but no order was included, or has been otherwise rendered, dismissing defendant's appeal (see *Harris v. Ellis*, 194 F2d 604; *Seymour v. Ellis*, 196 F2d 495; *Davis v. Ellis*, 199 F2d 754; *Harris v. Ellis*, 204 F2d 686; *Oliver v. Ellis*, 210 F2d 824; all recent cases in this Fifth Circuit in which, upon absence of certificates of probable cause, the appeals were affirmatively ordered dismissed).

3.—That, to fully preserve the rights of the State of Louisiana, the defendant-appellant applied for a rehearing upon the per curiam of May 31st, 1955, only declining to grant a certificate of probable cause, which rehearing was refused on July 18th, 1955.

4.—That, because it is the intention of the defendant-appellant sheriff, acting in behalf of the State of Louisiana and on the advice and instructions of the State's chief law officer, the Attorney General, to apply to the United States Supreme Court for a writ

of certiorari in this matter, the said defendant-appellant has respectfully called the Clerk's attention to the circumstance that, as of this time, no decree, ruling or order of this Court exists dismissing the instant appeal; nevertheless, counsel for appellant apprehends that it is the intention of the Clerk to treat the Court's per curiam of May 31st, as, in effect if not expressly, such a dismissal, and to issue a mandate accordingly to the District Court unless, within the ten (10) days required by Rule 32 of this Court, an application for a stay of mandate is made and filed by appellant.

Therefore, within the delay fixed by said Rule, appellant now respectfully moves this Honorable Court to stay the mandate in the above-entitled action and not permit the same to be issued out of this cause until the further order of the Court; that, alternatively, the Court may thereupon either dismiss this appeal, if the intention be to do so, and allow appellant opportunity for the customary application for rehearing upon such dismissal; or else render an appropriate final ruling that absence and refusal of a certificate of probable cause shall be considered tantamount in law to an affirmative dismissal (thereby reversing the precedents to the contrary of the five comparable cases in the Circuit above cited), and allow appellant opportunity for the customary application for rehearing upon such final ruling.

That if both of these alternatives are not considered by this Honorable Court as proper courses to pursue on this procedural situation and under the law and rules of court, then appellant respectfully

prays for this stay of mandate on the ground and for the reason that appellant expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari of the decision and judgment rendered in favor of relator-appellee and against defendant-appellant in the above entitled action.

That appellant respectfully shows he is entitled to apply to the Supreme Court of the United States of America for such a writ of certiorari under U.S.C.A., Title 28, Section 1651 (a), Judicial Code of 1948 (formerly U.S.C.A., Title 28, Section 377), and that in the fairly comparable case (on procedure) of *House v. Mayo*, decided February 5th, 1945, 324 U.S. 42, 65 S.Ct. 517, such a writ was granted and the decision of the District Court, and refusal of the Fifth Circuit to grant a certificate of probable cause, were reversed.

Appellant further shows to this Court that he is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause; although no monetary consideration is risked by the stay of mandate, since the relator is nevertheless to be held in custody under the District Court's writ of habeas corpus and either given a new trial in the State Court within six months from the final and effective date of the District Court's decree or else then released.

WHEREFORE, appellant prays that the Court make and enter an appropriate order herein, staying

the issuance of the mandate in the above-entitled action until the further order of the Court, and that the Court fix the amount of bond required of appellant, and that he be given a reasonable time in which to make, execute and file said bond.

FRED S. LeBLANC,
Attorney General of Louisiana.

M. E. CULLIGAN,
Assistant Attorney General.

HUGH M. WILKINSON,
Special Assistant Attorney General.

HARRY N. ANDERS,
District Attorney, Fifth District of Louisiana.

By (Signed) HUGH M. WILKINSON,
(Hugh M. Wilkinson),
Special Assistant Attorney General.

AFFIDAVIT.

Parish of Orleans,
State of Louisiana.

Before me, the undersigned authority, personally came and appeared Hugh M. Wilkinson, who, being by me first duly sworn, deposes and says:—

That he is one of the attorneys of record for the appellant in the above-entitled action; that all of the allegations made in the foregoing motion are true and correct, and that he has served a copy of same by mailing it to the chief attorney of the relator, Mr. Eugene Stanley, to his office in the Whitney Building, City of New Orleans, Louisiana, by regular United States mail, postage prepaid, on this date.

(Signed) HUGH M. WILKINSON,
(Hugh M. Wilkinson).

Sworn to and Subscribed before me this 28th day of July, 1955.

(Signed) HUGH M. WILKINSON, JR.,
(Hugh M. Wilkinson, Jr.),
(Seal) Notary Public.

ORDER DENYING MOTION FOR STAY OF MANDATE.

Filed July 30, 1955.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15,575.

HIRAM B. WALLER, Sheriff of the PARISH OF FRANKLIN, STATE OF LOUISIANA,
Appellant,

versus

UNITED STATES OF AMERICA, ex rel JOSEPH SHEFFIELD,
Appellee.

Order:

ON CONSIDERATION of the Motion filed by the Appellant in the above entitled and numbered cause for a Stay of the Mandate of this Court, to enable Appellant to apply for and to obtain a Writ of Certiorari from the Supreme Court of the United States,

IT IS ORDERED that said Motion for Stay of the Mandate in this cause be, and the same is hereby, DENIED.

(Signed) J. C. HUTCHESON, JR.,
Chief Judge, United States Court of Appeals.

July 30, 1955.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

I, JOHN A. FEEHAN, Jr., Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 75 to 146 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 15,575, wherein HIRAM B. WALLER, SHERIFF OF THE PARISH OF FRANKLIN, LOUISIANA, is appellant, and UNITED STATES OF AMERICA, EX REL JOSEPH SHEFFIELD, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the mimeographed record, Volumes I, II and III, numbered from 1 to 702, and of the portions of the mimeographed record, Volume IV, numbered from 1 to 74 are identical with the mimeographed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States

Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 4th day of October, A. D. 1955.

JOHN A. FEEHAN, JR.,
Clerk of the United States
Court of Appeals, Fifth
Circuit.

(Seal)

By CLARA R. JAMES,
Chief Deputy Clerk.